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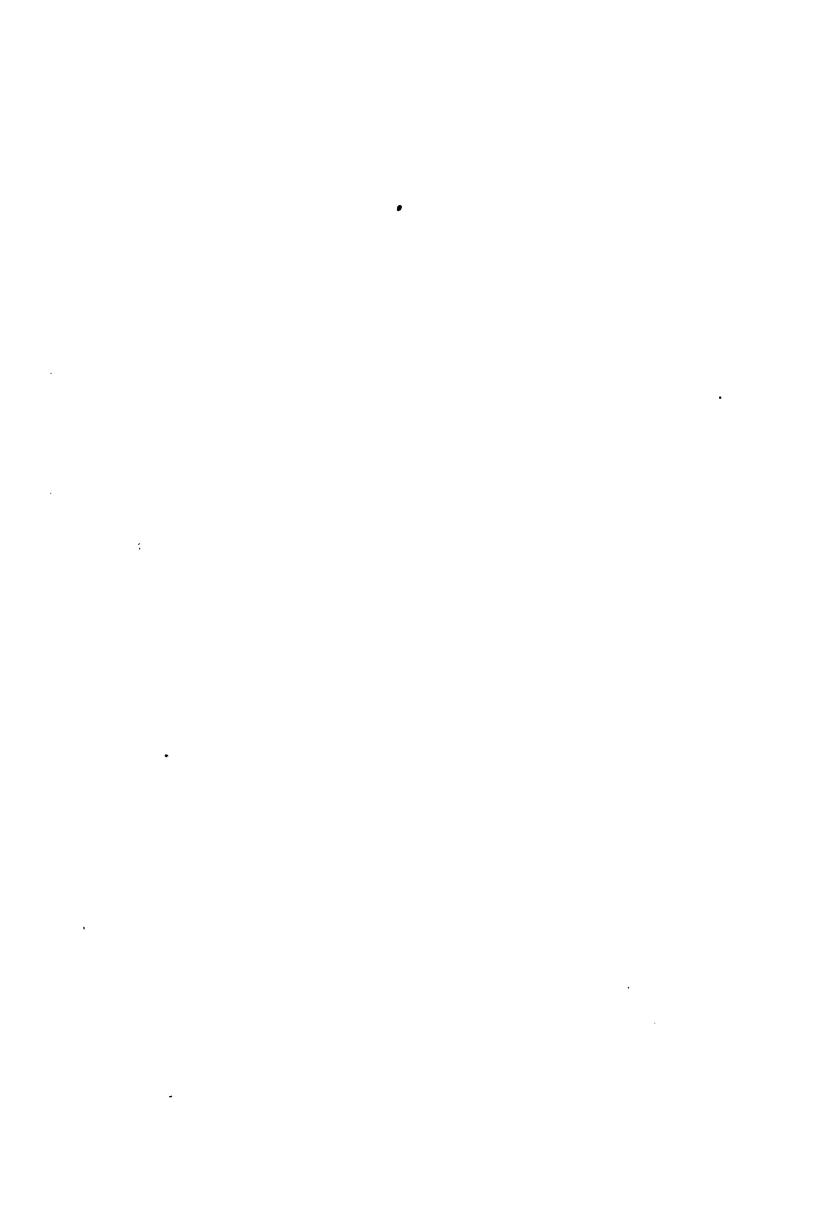
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25
Ohio. Laws, etc. etc. etc. etc. etc.
Annotated Ohio Code
OF CIVIL PROCEDURE.

BY
W. H. WHITTAKER,
(Of the Cincinnati Bar.)
EDITOR OF "WHITTAKER'S PROBATE CODE."

FIFTH REVISED EDITION.

CINCINNATI:
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PREFACE.

THIS edition contains the changes in the Code of Civil Procedure made at the last session of the General Assembly. The text has been enlarged, many new cases have been added to the notes, and the index has been thoroughly revised.

W.

CINCINNATI, July 1, 1896.

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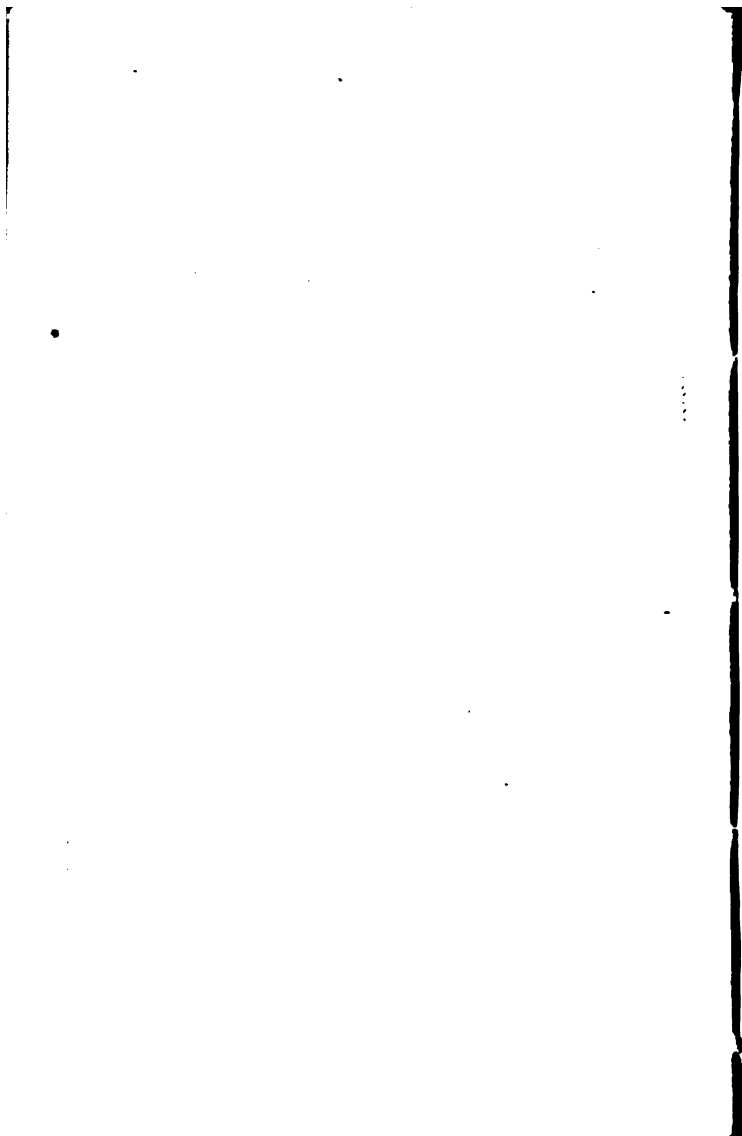
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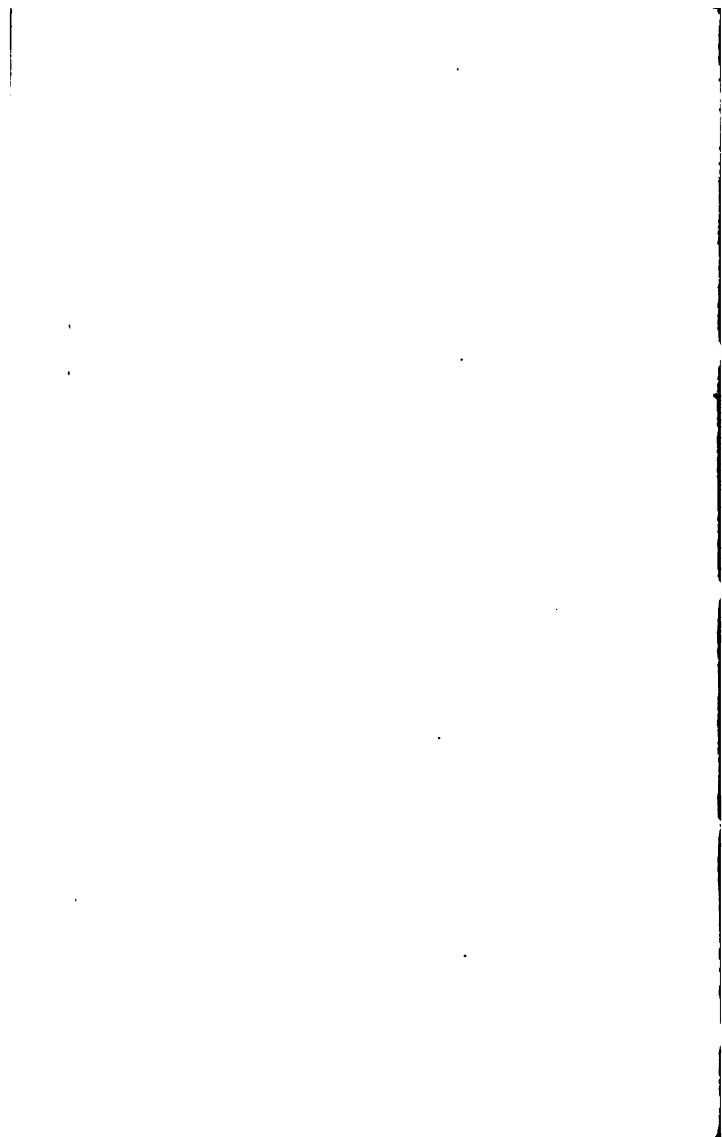
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Old Code Sec.	Rev. Statute Sec.	Old Code Sec.	Rev. Statute Sec.	Old Code Sec.	Rev. Statute Sec.	Old Code Sec.	Rev. Statute Sec.
1	Obs.	27	4995	50	5028	76	5053
2	4948	28	{ 4996	51	5029	77	5054
3	4971		{ 5319	52	5030	78	5055
4	4972	29	4997	53	5031	79	5056
5	4973	30	4998	54	5032	80	5019
6	4974	31	4999	55	5035	81	5020
7	Obs.		{ 5003	56	5036	82	5058
8	4976	32	{ 5004	57	5037	83	5057
9	4977	33	5004	58	5038		{ 5059
10	4978	34	5005	59	5039	84	{ 5071
11	6599	35	5006	60	5040	85	5060
12	4979	36	5007	61	5041	86	5061
13	4980	37	5008	62	5042	87	5062
14	4981	38	5009	63	5042	88	5063
15	4982		{ 5012	64	5042	89	5064
16	4983	39	{ 5149	65	5043	90	5065
17	4984	40	5013	66	5044	91	5066
18	4985	41	5014	67	5045	92	5070
19	4986	42	5016	68	5046	93	5071
20	{ 4987	43	5017	69	5047	94	5072
	{ 4988	44	5018	70	5048	95	5073
21	4989	45	5022	71	5049	96	5074
22	4990		{ 5023	72	5050	97	5075
23	4991	46	{ 5024	73	5051	98	5076
24	4992	47	5025	74	5052	99	5077
25	4993	48	5026		{ 5355	100	5078
26	4993	49	5027	75	{ 5356	101	5079

Old Code Sec.	Rev. Statute Sec.	Old Code Sec.	Rev. Statute Sec.	Old Code Sec.	Rev. Statute Sec.	Old Code Sec.	Rev. Statute Sec.
	Rep	133	5296	170	5516	203	5536
102	{ 53 v.	134	5111	171	5517	204	5537
	15	135	5112	172	5518	205	5538
103	5097	136	5113	173	5519	206	5539
104	5098	137	5114	174	5814	207	5540
	{ 5099	138	5115	175	5815	208	5541
105	to	139	5116	176	5816	209	5542
	5102	140	5117	177	5817	210	5543
	{ 5102	141	5118	178	5818	211	5544
106	5110	142	5119		{ 5819	212	5545
107	5103	143	5120	179	5820	213	5546
108	5104	144	5120	180	5821	214	5547
109	5105	145	5491	181	5822	215	5548
110	5106	146	5492	182	5823	216	5549
111	5107	147	5493	183	5824	217	5550
112	5108	148	5494		{ 5825	218	{ 5551
113	5109	149	5495	184	5826		5552
114	5096	150	5496	185	5825	219	5553
115	5058	151	5497	186	5827	220	5554
116	5058	152	5498	187	5828	221	5555
117	5085	153	5499	188	5829	222	5556
	{ 5087	154	5500	189	5830	223	5557
118	5088	155	5501	190	5831	224	5558
119	5089	156	5502	191	5521	225	5559
120	5090	157	5503	192	5522	226	5560
121	5091	158	5504	193	5523	227	5561
122	5086	159	5505	194	5524	228	5562
123	5092	160	5506	195	5525	229	5563
124	5093	161	5507	196	5526	230	5564
125	5094	162	5508	197	5527	231	5565
126	5095	163	5509	198	5528	232	5566
127	5081	164	5510	199	5529	233	5567
128	5082	165	5511		{ 5530	234	5568
129	5083	166	5512	200	to	235	5569
130	5084	167	5513		{ 5533	236	5570
131	5294	168	5514	201	5534	237	5571
132	5295	169	5515	202	5535	238	5572

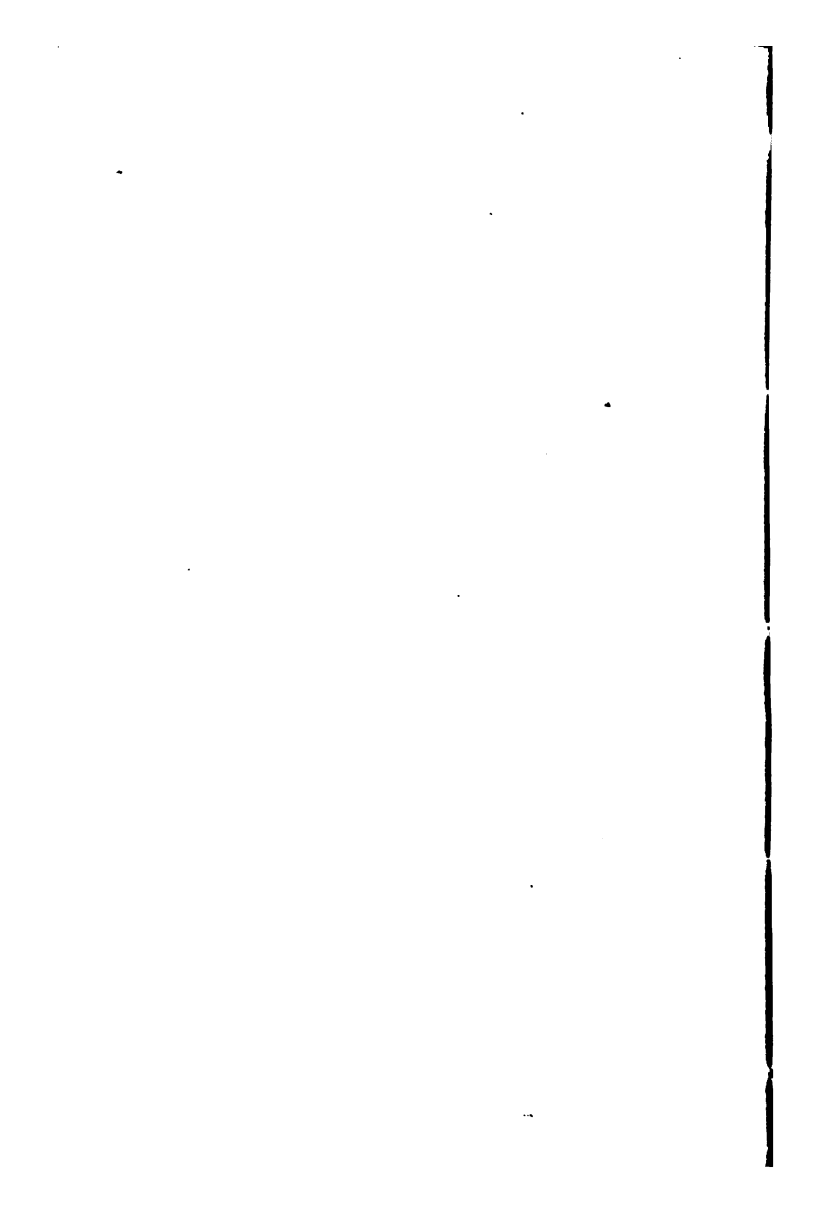
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241	5575		5199	307	5133	341	5270
242	5576	275	5200		5134	342	5271
243	5577	276	5201	308	5135	343	5272
244	5578	277	5202	309	5136	344	5273
245	5579	278	5203	310	5240	345	5274
246	5580	279	5204	311	Obs.	346	5275
247	5581	280	5205	312	5243	347	5276
248	5582	281	5210	313	5242	348	5277
249	5583	282	5211			349	5278
250	5584	283	5213	314	5241	350	5279
251	5585	284	5214	315	5241	351	5280
252	5586	285	5215	316	5246	352	5281
253	5587	286	5216	317	5247	353	5282
254	5588		5210	318	5248	354	5283
255	5589	287	to	319	5249	355	5284
256	5590		5212	320	5250	356	5285
257	5591	288	5217	321	5251	357	5286
258	5592	289	5218	322	5252	358	5287
259	5593	290	5297	323	5253	359	5288
260	5128	291	5298	324	5254		5289
261	5129	292	5299	325	5255	360	to
262	5127	293	5300	326	5256		5291
263	5130		5301	327	5257	361	5292
264	5131	294	5302	328	5258	362	5244
265	Obs.	295	5303	329	5259	363	5873
266	5190	296	5304	330	5251	364	5874
267	5191	297	5305		4950	365	5875
268	5192	298	5306	331	5260	366	5876
269	5193	299	5307	332	5261	367	5877
270	5194	300	5308	333	5262	368	5878
271	5195	301	5309	334	5262	369	5879
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273	to	304	4957	337	5264	371	to
	5199	305	4958	338	5265		5313

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372	5314	407	5154	440	5403	473	5481
373	5315	408	5155	441	5404	474	5487
	5316	409	5156	442	5405	475	5489
374	5317	410	5157	443	5406	476	5488
	5417	411	5158	444	5407	477	5447
375	5318	412	5159	445	5408	478	5448
376	5320	413	5160	446	5409	479	5449
377	5321	414	5161	447	5415	480	5450
378	5322	415	5366		5416	481	5451
379	5323	416	5369	448	5418	482	5452
380	5324	417	5367	449	5419	483	5453
381	5325	418	5372	450	5420	484	5454
382	5326	419	5373	451	5594	485	5455
383	5327	420	5374		5595	486	5456
384	5328	421	5375	452	5597	487	5373
385	5329	422	5380	453	5598	488	5490
386	5330	423	5381	454	5421	489	5377
387	5331	424	5382	455	5422	490	5367
388	5332	425	5383		5595		5378
389	5333	426	5444	456	5599	491	5379
390	5334	427	5445	457	5600	492	5377
391	5335	428	5446	458	5464	493	5140
392	5337	429	5384	459	5472		5142
393	5338		5385	460	5473	494	5142
394	Obs.	430	to	461	5474	495	5207
395	5399			462	5476	496	5208
396	5400		5387	463	5482	497	5209
397	5401	431	5388	464	5475	498	5141
398	4975	432	5389	465	5479		5142
399	5144	433	5390	466	5479	499	5139
400	5146	434	5391		5480		5142
401	5147	435	5392	467	5483	500	5845
402	5148	436	5393	468	5484	501	5846
403	5150	437	5398	469	5486	502	5847
404	5151	438	5401	470	5485	503	5121
405	5152		5402	471	5478	504	5122
406	5153	439	5403	472	5477	505	5123

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506	{ 5124	536	5358	564	5785	592	{ 4970
	5125	537	5359	565	Obs.		{ 5596
507	5125	538	5360	566	4994	593	{ 4969
508	5126	539	5361	567	4994		{ 4970
509	5310	540	5362	568	Obs.	594	4970
510	4963	541	5363	569	6741	595	4949
511	6708	542	5365		{ 6742	596	4950
512	6707	543	5340	570	{ 6744	597	4951
513	6709	544	5341	571	6747	598	5320
514	6710	545	5342	572	6745	599	4952
515	6713	546	5343	573	6743	600	4953
516	6714	547	5344	574	6746	601	439
517	6716	548	5345	575	6748	602	
518	6717	549	5346		{ 6749	603	
519	6718	550	5347	576	{ 6750	604	{ Obs.
520	6720	551	5348		{ 6751	605	
521	6719	552	5349	577	{ 6752	606	
522	6722	553	5350	578	6753	607	6721
523	6723	554	5351	579	6754	608	6730
524	6724	555	5352	580	6756	609	6715
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526	6726		{ 5779	582	4967		{ 5219
527	6727	557	{ 5780	583	4968		{ 5221
528	6728	558	5781	584	4959	611	{ 5222
529	6729	559	5782	585	4960		{ 5223
530	6731	560	5783	586	4961	612	5220
531	6732	561	5784	587	4958	613	5224
532	6731		{ Rep.	588	4962		{ Obs.
533	6734	562	{ 55 v.	589	4964	614	{ and
534	5354	563	{ 84.	590	4965		{ om.
535	5357			591	4966		



Rules of Practice of Supreme Court.

ADOPTED AS REVISED JANUARY TERM,

A. D. 1894.

RULE I. Sessions in term. The regular public sessions of the supreme court shall be held in the supreme court room, in the Capitol, on Tuesday and Thursday of every week during the term of the court, commencing at 9:30 o'clock A. M., standard time, on Tuesdays, and 8:30 o'clock A. M., standard time, on Thursdays, and only on other days of the week by special assignment, as the convenience of the business may require it; and the sessions in the Consultation Room shall be between the hours of 8:30 o'clock A. M., and 4:30 o'clock P. M., standard time.

RULE II. Order of business. The business of the general docket shall be proceeded in as follows:

1. On the opening of court, on the first day of the stated term, the first seventy-five causes on the docket will be called, and afterward the further call of the docket will be proceeded with on the first Tuesday of each month during the session of court to the extent of seventy-five causes more on each day, in the order in which they appear on the docket, provided a sufficient number have not already been called to occupy the attention of the court during the ensuing month.

2. Any cause may be submitted, however, on behalf of either or both parties at any time, whatever may be its place on the docket.

3. When a cause is called on the docket, and neither

party appears in person or by attorney, it shall be marked submitted, and when reached for decision shall be disposed of as the court shall deem fit and proper, according to the state and condition of the cause.

4. Causes will be taken up for decision in their order on the docket, and not otherwise, except on motion duly filed; and for special reasons, a cause may be taken out of its order and assigned for hearing or decision at a particular time, as authorized by §440, Revised Statutes. But proceedings in error to reverse, vacate, or modify a conviction for a felony, will be advanced by the court, without motion, on the allowance of the filing of the petition.

5. Parties desiring to be heard in oral argument, must notify the court of that fact, and have their causes set for oral argument at the time of the call of the causes on the docket, if not previously done; otherwise oral argument will be considered as waived.

6. In all cases where the briefs filed in compliance with Rule IV., do not contain all points and authorities intended to be relied upon on oral argument, counsel must, five days before the cause is set for hearing, furnish opposite counsel with a brief statement of any additional points and authorities intended to be presented; and each member of the court and the reporter must be furnished with a copy the day before the oral argument. At the conclusion of the oral argument, time will not be given for the filing of briefs thereafter; and all cases assigned for oral argument must be submitted on the day they are assigned for such argument.

7. No motion to take a cause out of its order and advance it for hearing, will be entertained on the part of the plaintiff until it is ready to be submitted by him, and when allowed, time will be given the defendant, not exceeding 60 days, in which to prepare and file his brief; nor, on the part of the defendant, until the record has been printed (unless dispensed with); and when allowed, the brief of the plaintiff must be filed sixty days thereafter, and that of the defendant, in sixty days after the expiration of the time allowed the plaintiff. If oral argument is desired

by either party, notice must be given at or before the motion to take out of order is made.

8. When a cause is reached for decision which has not been argued, and in which plaintiff, or party having the affirmative, has filed no printed argument or brief, as required by Rule IV., the cause will be dismissed, remanded, or otherwise disposed of, at the discretion of the court.

9. The sessions of the court, on Thursday of each week, will be devoted to the business of the motion docket.

10. A motion shall not, without special leave of the court, be orally argued beyond fifteen minutes on either side.

11. An application for an extension of time in which to file a brief in any cause after the same has been called, must be by motion and on notice to the opposite party; and ten minutes will be allowed each side on the hearing of the motion. But it may be submitted by either upon a written statement of the reasons for or against the delay.

§ 440, R. S. Order of docketing and hearing of cases.

All cases brought in or taken to the court shall be entered on the docket in the order in which they are commenced, received, or filed, and they shall be taken up and disposed of in the same order, except that the court may take up and dispose of the following classes of cases in advance of their order on the docket; cases where the persons seeking relief have been convicted of a felony; cases involving the validity of any tax levied, or assessment made, or the power to make such levy or assessment; cases involving the construction or constitutionality of any statute, or any question of practice, where the questions arising are of general public interest; and proceedings in *quo warranto*, *mandamus*, *procedendo*, or *habeas corpus*; and cases of general interest to the public, where two or more of the circuit courts of the state have held the law directly opposite upon like facts; where the relief sought is damages for personal injury, or for death caused by negligence, and the person injured makes affidavit that he is, or in case of death, the widow, or any of the next of kin to the deceased, makes affidavit that

they are dependent for their livelihood upon their daily labor ; and all cases in which any trust fund for the care, support or education of any minor or care or support of any imbecile person is in question, and when any case is reached in its order, and there are other cases on the docket involving the same question, or some of them, the latter may be taken out of their order and disposed of with the case so reached ; and when a case is disposed of, and again comes into court, it shall be taken up as if it had its original place on the docket. Provided, that in all cases on the docket of said court where there is involved the construction of the statutes, or any of them providing for the annexation of territory to a municipal corporation, the court may take up and advance said cases out of their order on the application of either party. And this section shall apply to all actions now pending, as well as those hereafter to be brought. [88 v. 381.]

RULE III. Oral argument. When a cause on the general docket is argued orally, the time allowed for each side shall not exceed one hour, unless, for special reasons to be adduced before the argument commences, the court shall extend the time.

RULE IIIa. Where a case is orally argued before a division of the court, and reserved to the whole court for decision, neither party is entitled to further oral argument.

RULE IV. Briefs and transcripts. No civil cause will be heard or considered, whether marked for oral argument or not, unless the plaintiff, or party holding the affirmative, shall have caused to be filed with the clerk, for the use of the court and reporter, ten printed copies of so much of the record, testimony, and documents therein, necessary to be considered by the court, in octavo size, pamphlet form, and suitable for binding, with index and marginal references (the cost of which printed copies shall be taxed as costs in the cause), and shall also have filed with the clerk a like number of printed copies in like form of a brief or argument therein, containing a statement of the questions presented, and a succinct statement of so much of the cause, referring to the pages of the printed record, as is necessary to show how the questions arise, with marginal references to the head-

ings and points made; and for want of such printed copies, unless good reason be shown to the contrary, the cause may, on call of the docket, be dismissed as for want of prosecution.

And no brief or argument on behalf of the defendant or party holding the negative will be read or considered, unless it be printed with like references, and a like number of copies filed with the clerk.

A copy of the printed record, and all briefs or argument, shall be furnished to opposite counsel a reasonable time before the cause is called upon the docket, and proof of such service of records and briefs shall be filed with the clerk.

RULE V. Printing records, etc. It shall be the duty of the clerk, on the written precept of either party, his or their attorney, to any suit pending in this court, and on such party depositing with the clerk such sum of money as may be reasonably necessary to defray the expenses, to make up from the files, in proper order, to be printed for the purposes of the hearing or trial of a cause, a copy of the pleadings, exhibits, evidence and proceedings therein, preserving the date of the commencement of the action and the date of the filing of each pleading, dispensing with the formal captions, verifications, and official certificates, where the same may not be material to the questions to be adjudicated, and to cause to be printed fifteen copies thereof for the use of this court and the counsel in the cause; and the costs thereof, unless otherwise ordered by the court, shall be taxed in the cost bill, and such disposition or application shall be made of the said deposit as to the court shall seem equitable. Where the case is on error, the matter to be printed shall be indicated by the party filing the precept, in accordance with Rule IV.

RULE VI. Points decided. A syllabus of the points decided by the court, in each cause, shall be stated in writing by the judge assigned to deliver the opinion of the court, which shall be confined to the points of law arising from the facts of the cause that have been determined by the court.

And the syllabus shall be submitted to the judges concurring therein, for revisal, before the publication thereof; and it shall be inserted in the book of reports

without alteration, unless by the consent of the judges concurring therein.

RULE VII. Applications in error. When an application for leave to file a petition in error has been made in vacation to a judge of the supreme court and disallowed, no other application therefor shall be made, except to the court in session.

RULE VIII. Notice of applications in error. In cases where leave of the court or of a judge to file a petition in error is required, notice in writing of the intended application, briefly specifying the errors relied on, shall be given to the adverse party, or his attorney, at least ten days when made to the court, and five days when made to a judge, before the application shall be acted upon, unless, in view of special circumstances attending the case, the court or judge should determine that justice required the time of such notice to be abbreviated or such notice to be dispensed with. A copy of such notice, with the proof of the service thereof and petition in error, shall accompany the application.

RULE IX. Return of papers. After the decision of a cause in the supreme court, in which a final record is not required to be made in that court, the original papers shall be returned to the clerk of the proper court; when so returned, the clerk of the supreme court shall seal them up and direct them to the clerk of such court, and forward them as said clerk may in writing direct. If not so directed within a reasonable time, they may be sent by express.

RULE X. Files of cases disposed of. The papers in cases heretofore or hereafter disposed of (and not returned to the counties, or withdrawn by leave of the court) shall be filed away in convenient packages by the clerk, with a label on each package, on which shall be written or printed "Cases Decided," "General Docket," or "Motion Docket," (as the case may require), and also the term at which the same were disposed of, and the numbers of the cases in each package; which numbers shall correspond with those of the docket of said term. The papers in cases on the General Docket shall be put in separate packages from

those on the Motion Docket, and the papers of one term shall, as far as may be practicable, be kept in different pigeon-holes or places of deposit from those of any other term.

RULE XI. The minute book and its contents. There shall be kept by the clerk a book, to be called the minute book, in which shall be separately entered every cause and motion hereafter docketed in this court, except motions in pending causes, which latter motions shall be noted in their respective causes, but shall not be separately entered in said book, and also the date of docketing the same, and the payment of fees and by whom paid. He shall also briefly note therein the issuing and date of all process sued out of this court, the return day thereof, when returned, whether served or not, and the date of service, if made; also, under the proper dates, the filing of all pleadings, depositions, briefs, or other papers that may be filed in the cause, in this court; and briefly note all motions in the cause that may be placed on the motion docket; and all orders and judgments of this court in the cause, with a reference to the journal and page where the same may be entered, and to the volume and page of the complete record thereof, if there be one. He shall also note therein by whom and when any papers may be taken from his office, and when returned.

RULE XII. Withdrawal of briefs. After a cause has been decided and reported, counsel may withdraw manuscript briefs from files.

RULE XIII. When records are to be completed. In cases decided before the first of May in any term, if complete records therein are to be made in this court, they shall be completed before the first day of the ensuing October.

RULE XIV. Provides rules for admission to the bar.

RULE XV. Petitions in criminal causes. A motion for leave to file a petition in error in a criminal cause, with the transcripts, containing marginal references, together with the assignments of error, shall be filed with the clerk at least five days before the same shall

stand for hearing, unless, for good cause shown in any case, the court otherwise order.

RULE XVI. Notice of motions. No motion will be permitted to be placed upon the motion docket for hearing until proof of notice to opposing counsel of the filing and time for hearing such motion is filed with the clerk.

RULE XVII. Filing of motions. A motion can not be filed on the day set for its hearing, except by a special leave of the court.

RULE XVIII. Briefs on motion for leave. 1. A motion for leave to file a petition in error will not be considered, unless counsel for the applicant file with the papers in the case either a printed or plainly written brief, containing a statement of the questions presented, and a short statement of so much of the case as may be necessary to show how the questions arise.

2. Petition in error in civil cases from the circuit court is filed without leave of court; fees, \$5.

RULES OTHER THAN THOSE PECULIAR TO THE SUPREME COURT.

RULE XIX. Making up records. Records of cases decided shall be made as follows:

1. In all cases in which the supreme court and circuit court have original jurisdiction, a full record shall be made up.

2. In cases in error in said courts, no record shall be made, except at the request and costs of the party desiring the same to be done; but the papers in all such cases shall be carefully preserved, filed, and labeled in packages, numbered with corresponding numbers upon the margin of the journal where the final orders, respectively, are made.

3. In cases in error in which the appellate court reverses the judgment of the court below, and orders further proceedings below to be had in the original case, the record afterward made up below shall contain the judgment of reversal, and the further pro-

ceedings thereafter had in the court below; but the files of the appellate court, upon which said order of reversal was had, shall not be recorded in the court below, except at the request and costs of the party desiring the same to be done.

RULE XX. Preservation of record and files. The clerk of the court shall be answerable for all records belonging to his office, and all papers filed in the court; and they shall not be taken from his custody, unless by special order of court, or on the written consent of the attorneys of records for all the parties, but the parties may at all times have copies on paying the clerk therefor.

RULE XXI. Mandamus. A writ of mandamus, unless otherwise specially ordered, shall be served on or before the second Monday next after the date thereof, and the writ shall demand the defendant, or defendants, to return and answer the same on or before the third Saturday after said second Monday at the place of the holding of the court, to be named in the writ.

RULE XXII. Cases taken under advisement in circuit. No cause in the circuit court shall be reserved and taken under advisement for decision in another county on the circuit, except by the consent of both the parties or their counsel; and in such cause an order shall be made on the journal of the court that the cause is so taken under advisement for decision in a county in the district to be named. And after a decision of a cause on the circuit, it shall be certified back and entered in the court of the county from which it was taken.

RULE XXIII. Continuance. In all applications for the continuance of a cause in the circuit court, and for a second continuance in the common pleas, on the ground of inability to procure the testimony of an absent witness, the party making the application shall state in his affidavit what he expects to prove by such witness, and also what acts of diligence he has employed to procure the testimony of such witness; and if the court find the testimony material, and that due diligence has been used, said cause may be continued, unless the opposite party consent to

the reading of such affidavit in evidence; in which case the trial may proceed, and said affidavit be read on the trial, and treated as the deposition of an absent witness. First applications for continuance in the common pleas shall be subject to such regulations as that court shall adopt.

RULE XXIV. Record in case appealed. In cases in which notice of appeal is entered in the common pleas and perfected, no record shall be made up in the court of common pleas, except at the request and cost of the party desiring the same to be done.

The foregoing rules shall take effect from and after January 1, A. D. 1894.

RULES OF PRACTICE OF CIRCUIT COURTS OF OHIO.

RULE I. Bill of exceptions. Bills of exceptions must be printed or written in a plain, legible hand, upon but one side of the paper. Each page must be numbered, and there must be marginal references to the important parts relied upon. Each bill of exceptions must contain a full index; must have a pasteboard or other substantial cover, and in no case shall it be folded or rolled. Any failure to comply with these requirements will be deemed sufficient reason for disregarding, or striking from the files, the bill of exceptions, unless good reason be shown for such failure.

Exceptions relating to the admission of testimony contained in a voluminous bill of exceptions will not be considered by the court unless marginal references are made; 7 C. C., 185.

RULE II. Transcripts. The transcript of the journal entries required to be filed, shall contain the entries arranged in the order they appear on the journal, with the date and term of court of each entry; and the proper certificate of the clerk of the court shall be attached at the end of such transcript.

RULE III. Continuances. An application for the continuance of a cause shall be by motion, supported by affidavit; and if the continuance is asked for on the ground of inability to procure the testimony of an absent witness, the party making the application must state in his affidavit what he expects to prove by such witness, and also by what acts of diligence he has endeavored to procure the testimony of such witness. If the court finds the testimony material, and that due diligence has been used, such cause may be continued, unless the opposite party consents to the reading of such affidavit in evidence, in which case the trial may proceed and such affidavit be read on the trial, and treated as the deposition of the absent witness.

RULE IV. Preservation of records and files. The clerk of the court shall be answerable for all records belonging to his office, and all papers filed therein. They shall not be taken from his custody unless by special order of the court or a judge thereof, or on the written consent of the attorneys for all the parties, which consent must be filed

with the clerk, who shall also, in all cases, take the receipt of the attorney so receiving such records or papers. All records and papers must be returned to the custody of the clerk at least three (3) days before the first day of each term of the court, and shall so remain during the session of the court. Parties and their attorneys shall, at all reasonable and proper times, have access to such records and papers for inspection in the clerk's office, or may procure copies from the clerk on paying the proper fees therefor.

RULE V. Arguments on motions. No oral argument upon any motion shall occupy longer than fifteen minutes on a side, unless the court, for special reasons, to be assigned before the hearing, shall extend the time.

RULE VI. Arguments on error. The attorney representing the plaintiff in error shall, in a brief and concise manner, state his case and the errors complained of, and each party shall then have not to exceed one hour for the oral argument of the cause, unless the court, for special reasons, to be assigned immediately after the statement of the case, shall extend the time.

RULE VII. Arguments on appeal. In appeal cases, after the testimony is all in, arguments of counsel may be limited to such time as the court, in its discretion, may deem right and proper.

RULE VIII. Briefs. Counsel shall, on the submission of a cause, file with the court a written or printed brief, containing a statement of the questions presented, and a succinct statement of so much of the cause, referring to the pages of the record, as is necessary to show how the questions arise, together with a statement of the authorities relied on.

RULE IX. Journal entries. Counsel for the party in whose favor an order, decree, or judgment is rendered, shall, within twenty-four (24) hours thereafter, unless further time be given by the court, prepare the proper journal entry, and submit it to the counsel for the adverse party, who shall approve or reject the same within twenty-four (24) hours after its receipt. When approved by counsel and the court, it shall be immediately furnished to the clerk, who shall forthwith enter the same upon the journal. Upon failure to comply with this

rule, unless good reasons be shown to the contrary, the cause may be dismissed as for want of prosecution.

RULE X. Finding of facts. The party requesting a finding of facts shall, within twenty-four (24) hours after the order, judgment, or decree is rendered, unless further time be given by the court, prepare the finding of facts, and submit the same to the counsel of the adverse party, and within twenty-four (24) hours after its receipt by him the same shall be submitted to the court; and for want of a strict compliance with this rule, unless good cause be shown to the contrary, the clerk shall enter a general finding instead of a finding of facts.

RULE XI. Adoption and suspension of rules. The judges of the several circuits may adopt such rules upon questions of practice, not covered by the foregoing rules, as they may deem expedient, or may, if they deem proper, suspend the operation of any rule in their circuit until the next annual meeting of the circuit judges. [*Adopted to take effect on 1st October, 1885.*]

Order and disposition of cases, see § 448 R. S. (91 v. 304).

JURISDICTION.

Jurisdiction of supreme court. The supreme court has original jurisdiction in *quo warranto*, *mandamus*, *habeas corpus*, and *procedendo*, and such appellate jurisdiction as may be provided by law, Const., Art. iv., § 2.¹ The supreme court, when in session, in addition to the original jurisdiction conferred by the constitution, may, on good cause shown, issue writs of supersedeas, in any case, and all other writs, not specially provided for, nor prohibited, by statute, which may be necessary to enforce the due administration of justice throughout the state, § 442.

Jurisdiction of circuit courts. The circuit court has like original jurisdiction with the supreme court, and such appellate jurisdiction as may be provided by law, Const., § 6, Art. iv. It may issue writs of supersedeas as the supreme court, § 447, 82 v. 20.

§ 456. **Jurisdiction of common pleas court.** The court of common pleas shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds the exclusive original jurisdiction of justices of the peace; and appellate jurisdiction from the decision of county commissioners, justices of the peace, and other inferior

¹50 O. S. 714, 718.

courts in the proper county, in all civil cases, subject to the regulations provided by law. It shall have original jurisdiction of all crimes and offenses, except in cases of minor offenses, the exclusive jurisdiction of which is vested in justices of the peace, or that may be vested in courts inferior to the common pleas; provided, however, that in all criminal cases where a person is indicted and tried in the court of common pleas for an offense properly cognizable therein, and he is found guilty of any such minor offense embraced within the terms of the indictment, the jury shall so return in their verdict, and the court shall thereupon proceed to pass the sentence prescribed by law in such case. [52 v. 73, § 5; S. & C. 386.]

Jurisdiction of justices. Justices of the peace have exclusive original jurisdiction of any sum not exceeding \$100, and concurrent jurisdiction with the court of common pleas in any sum over \$100 and not exceeding \$300, § 585.

THE
CODE OF CIVIL PROCEDURE
OF
THE STATE OF OHIO.

ABBREVIATIONS.

- Bull.*.....Weekly Law Bulletin, formerly Weekly Cincinnati
Law Bulletin.
C. C. R.....Circuit Court Reports of Ohio.
C. S. C. R...Cincinnati Superior Court Reporter.
D......Disney's Cincinnati Superior Court Reports.
H......Handy's Cincinnati Superior Court Reports.
Rec......American Law Record.
T......Tappan's Reports.
W......Wright's Nisi Prius Reports.
W. L. G....Weekly Law Gazette.
W. L. J....Western Law Journal.
W. L. M....Western Law Monthly.

TITLE I. DIVISION I.

CHAPTER I.

PROVISIONS PRELIMINARY AND MISCELLANEOUS.

§ 4947. **Interpretation of words.** In the interpretation of Part Third, unless the context shows that another sense was intended, the word "person" includes a private corporation (1); "writing" includes printing; "oath" includes affirmation; "of unsound mind" includes every species of mental deficiency or derangement; "bond" includes an undertaking; "and" may be read "or," and "or" read "and," if the sense requires it; words in the present include a future tense, and in the masculine gender include the feminine and neuter genders; and words in the plural include the singular, and in the singular include the plural number; but this enumeration shall not be construed to require a strict construction of other general words in this part. [83 v. 74.]

1. 43 O. S. 257.

§ 4948. **Construction of code.** The provisions of this part, and all proceedings under it, shall be liberally construed (1), in order to promote its object, and assist the parties in obtaining justice; and the rule of the common law, that statutes in derogation thereof must be strictly construed, has no application to this part; but this section shall not be so construed as to require a liberal construction of provisions affecting personal liberty, relating to amercement, or of a penal nature (2). [51 v. 57, § 2; S. & C. 940.]

1. 10 O. S. 452; 13 O. S. 219; 14 O. S. 417, 422; 17 O. S. 225; 43 O. S. 78. A pleading containing inconsistent statements is to be construed against the pleader, 29 O. S. 651, 655. See 39 O. S. 57, 58; 42 O. S. 625; 1 O. S. 478; 2 O. S. 1. 2. 20 O. 7; 1 O. S. 15; *Id.* 422; 14 O. S. 213; 38 O. S. 639.

§ 4949. **Power of deputies.** A duty enjoined by statute upon a ministerial officer, and an act permitted

to be done by him, may be performed by his lawful deputy. [51 v. 57, § 595; S. & C. 1130.]

A deputy clerk may sign summons in his own name, 15 O. 288, 566. A deputy clerk of the probate court can administer an oath, 25 O. S. 21, but not after his term of office, 39 O. S. 496; may be a female and need not be an elector, Id. A deputy sheriff can execute a sheriff's deed, 4 O. 88; it must be in the name of the principal, 9 O. 151; but an acknowledgment of such deed by a deputy after the death of the sheriff is void, Id. A deputy sheriff can call bystanders, 35 O. S. 421, but can not act in selecting a struck jury, Id. A sale upon order for sale under a decree in chancery could be made by a deputy sheriff, 16 O. 563.

§ 4950. **Form of oath.** A person may be sworn in any form he deems binding on his conscience. [51 v. 57, §§ 331, 596; S. & C. 1130, 1040.]

10 O. 121.

§ 4951. **How time computed.** Unless otherwise specially provided, the time within which an act is required by law to be done shall be computed by excluding the first day and including the last (1); and if the last be Sunday, it shall be excluded (2). [51 v. 57, § 597; S. & C. 1130.]

1. 2 O. 297, 299; W. 513; 4 C. C. 138. The section does not apply in computing the time to advertise notice of sale on execution, 25 O. S. 186. 2. 7 O. S. 198. The section is applicable to justice's code, 9 Rec. 634; but was not prior to the revision, 29 O. S. 155. See §§ 3176, 3177, as to commercial paper.

§ 4952. **Justification of sureties.** A court, or an officer, authorized by law to approve a surety, may require such person to testify, orally or in writing, touching his sufficiency; but this shall not, in itself, exonerate the officer in an action for taking insufficient surety. [51 v. 57, § 599; S. & C. 1130.]

§ 4953. **Qualifications of sureties.** Sureties must be residents of this state, and worth, in the aggregate, double the sum to be secured, beyond the amount of their debts, and have property liable to execution in this state equal to the sum to be secured. [51 v. 57, § 600; S. & C. 1130.]

Non-resident, 6 O. 428. Corporations, 88 v. 14.

§ 4954. **Provisions concerning process.** Process shall be under the seal (1) of the court from which it issues, be styled "The State of Ohio, — County," be signed by the clerk (2), and bear date the day it is actually issued. [51 v. 57, § 581; S. & C. 1128.]

1. 6 O. 11; Const. Art. 4, Sec. 20. A slight impression presumed to be a seal after the lapse of years, 15 O. 735, 752. Private seals are abolished, 80 v. 79; 81 v. 198. 2. Or deputy, 15 O. 288.

§ 4955. When publication may be made in another county. When it is provided by statute that a notice shall be published in a newspaper, and no such paper is published in the county or other place mentioned, or, if such paper is published there, and the publisher refuse, on tender of his usual charge for a similar notice, to insert the same in his newspaper, then a publication in a newspaper of general circulation in the county or other place mentioned shall be sufficient.

§ 4956. When special provisions shall govern. Where in part three of this revision special provision is made as to service, pleadings (1), competency of witnesses, or in any other respect, inconsistent with the general provisions in this title, the special provision shall govern, unless it appear that the provisions are cumulative (2).

1. 11 Bull 294. 2. See 43 O. 8. 390, 394. Where a statute gives a new remedy without impairing or denying one already known to the law, the rule is to consider it cumulative, 15 O. 65, 71.

CHAPTER II.

SPECIFIC DUTIES OF CERTAIN OFFICERS.

§ 4957. Books to be kept by clerk. The clerk of the court of common pleas shall keep at least five books, to be called the appearance docket, trial docket, and printed duplicates of the trial docket for the use of the court and the officers thereof, journal, record, and execution docket, and an index to the trial docket, and the printed duplicates of the trial docket, and journal direct, and to the appearance docket, record and execution docket, direct and reverse. [86 v. 174.]

§ 4958. Entries on appearance docket. The clerk shall enter on the appearance docket, at the time of the commencement of an action or proceeding, the names of the parties in full, with names of counsel, and forthwith index the case, direct and reverse, in the name of each plaintiff and defendant; he shall also enter, at the time it occurs, under the case so docketed, the issue of the summons, or other mesne process or order, and the filing of each paper; and he shall record in full the return on such writ or order, with the date of its return, to the

court, which entry shall be evidence of such service [51 v. 57, §§ 305, 587; S. & C. 1034, 1129.]

§ 4959. **Writs to issue on precipe.** All writs and orders for provisional remedies, and process of every kind, shall be issued by the clerks of the several courts; but before they are issued a precipe shall be filed with the clerk demanding the same. [51 v. 57, § 584; S. & C. 1129.]

The clerk is not bound to issue process without a written precipe. 6 O. 150

§ 4960. **Clerk to file and preserve papers.** The clerk shall file together, and carefully preserve in his office, all papers delivered to him for that purpose, in every action or proceeding. [51 v. 57, § 585; S. & C. 1129.]

A paper is considered filed when delivered to and received by the proper officer, 43 O. S. 57; when placed in the clerk's office and either strung upon a thread or laid in a drawer or pigeon-hole, 4 O. 88. The indorsement by the clerk is but evidence of such filing, 43 O. S. 57.

§ 4961. **Clerk's indorsement of papers filed.** The clerk shall indorse upon every paper filed with him the date of the filing thereof; and upon every order for a provisional remedy, and upon every undertaking given under the same, the date of its return to his office. [51 v. 57, § 586; S. & C. 1129.]

4 O. 88; 43 O. S. 57.

§ 4962. **Clerk to keep books and make records.** The clerk shall keep the journals, records, books, and papers appertaining to the court, and record its proceedings. [51 v. 57, § 588; S. & C. 1129.]

See 1 O. 268; 5 O. 486; 6 O. 409; 1 C. C. R. 28, 30.

§ 4963. **Record of orders out of court.** Orders made out of court shall be forthwith entered by him in the journal of the court, in the same manner as orders made in term. [51 v. 57, § 510; S. & C. 1099.]

The clerk should minute on the journal the receipt of a mandate from the supreme court, its judgment, and order for execution, 6 O. 409; 2 O. S. 98.

§ 4964. **Provisions applicable to all clerks.** The provisions prescribing the duties of clerks of the court of common pleas shall, so far as they are applicable, apply to the clerks of other courts of record. [51 v. 57, § 589; S. & C. 1129.]

It is the practice of the clerk of the supreme court of the state to enter mandates from the U. S. Supreme Court, 6 O. S. 342.

§ 4965. General provisions as to duties of clerks. The clerk of each of the courts shall exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law; and in the performance of his duties, he shall be under the direction of his court. [51 v. 57, § 590; S. & C. 1129.]

The court has power to direct the clerk to correct errors in the records and files, 8 O. S. 201.

§ 4966. Sheriff to indorse on writ time of its receipt. The sheriff shall indorse upon every writ or order the day and hour it was received by him. [51 v. 57, § 591; S. & C. 1130.]

§ 4967. When process directed to coroner, or other person. Process in an action wherein the sheriff is a party, or is interested, shall be directed to the coroner; and if both these officers are interested, the process shall be directed to, and executed by, a person appointed by the court or judge. [51 v. 57, § 582; S. & C. 1128.]

33 O. S. 86.

§ 4968. Person appointed to serve process. The court or judge may, for good cause, appoint a person to serve a particular process or order, who shall have the same power to execute it which the sheriff has; the person may be appointed on the motion of the party who obtains the process or order, and the return must be verified by affidavit; and he shall be entitled to the fees allowed to the sheriff for similar services. [51 v. 57, § 583; S. & C. 1128.]

§ 4969. Sheriff may adjourn court when judges absent. If the judge of the common pleas court, or a quorum of the judges of the circuit court, fail to attend at the time and place appointed for holding the court, or if, after the calling of the court, the judge of the common pleas court or a quorum of the judges of the circuit court are unable, on account of sickness, or from any other cause, to attend the daily sessions thereof, the sheriff shall adjourn the court from day to day, until the judge of the common pleas court attends or a quorum of the circuit court is convened; but if the judge or judges be not present within three days after the first day of the term, or if, after the court is called, such judge or judges are unable,

on account of sickness, or from any other cause, to be present for ten days, the court shall stand adjourned for the term. [82 v. 16; 79 v. 15; 51 v. 57, § 593; S. & C. 1130.]

§ 4970. **General duties of sheriff.** The sheriff shall execute every summons, order, or other process, return the same as required by law, and exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law. [51 v. 57, §§ 593, 594; 65 v. 96, § 592; S. & C. 1130; S. & S. 572.]

An officer may not examine into the irregularity of the proceedings of the court whose process he executes, 6 O. 144. He is not bound to execute a writ void upon its face, 6 O. 11, and may refuse to execute it for want of jurisdiction, 29 O. S. 617. He is liable for executing a process when it appears on its face that the court had no jurisdiction of the person or subject matter, 7 O. S. 42; but is justified when no want of jurisdiction appears on its face, 7 O. (Pt. 2) 133. He can not claim a reward for arresting a fugitive from justice, 12 O. 281, and is not entitled to fees for making an arrest in another state, 9 O. 25. He can not refuse to execute process in a civil action because his fees are not tendered or secured in advance unless the action is brought by a non-resident or firm in its firm name, 17 Bull 86 (C. P.). Conclusiveness of official return, 14 O. S. 240. Service on Sunday lawful, 42 O. S. 585.

DIVISION II. COMMENCEMENT OF ACTIONS—JURISDICTION—ISSUE.

CHAPTER I.

FORM OF ACTION.

§ 4971. **One form of action.** There shall be but one form of action, which shall be known as a civil action. [51 v. 57, § 3; S. & C. 941.]

The code has abolished distinctions between actions at law and in equity, so far as relates to name and form, 7 O. S. 325; 11 O. S. 635; 12 O. S. 165; 16 O. S. 552; 21 O. S. 596; 33 O. S. 541; but it has not abolished legal or equitable rights, 15 O. S. 415; 2 W. L. M. 125. Its leading object is to avoid circuity and multiplicity of suits, 20 O. S. 38, 54; 14 O. S. 302, 306; and the court is to be regarded as a court of law or equity, and the petition a declaration or a bill in chancery, according to the nature of the case, 11 O. S. 626, 635. Prior to the revision of 1880, the term "civil action" only embraced such cases as were known as "actions at law" and "suits in equity," 15 O. S. 461, and did not embrace proceed-

ings in mandamus, 32 O. S. 236, nor proceedings in *habeas corpus*, *quo warranto*, nor special statutory proceedings, such as partition, dower, divorce, etc., Yapple's Code Practice, etc. p. 288. The word "action," synonymous with "suit," 3 C. C. 447.

§ 4972. **Parties, how designated.** In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant. [51 v. 57, § 4; S. & C. 941.]

§ 4973. **Feigned issues abolished.** There can be no feigned issue (1); but a question of fact not put in issue by the pleadings may be tried by a jury, upon an order for the trial stating the question of fact to be tried; and such order shall be the only authority necessary for a trial (2); or such question may be referred, in the same way, to one or more persons. [51 v. 57, § 5; S. & C. 941.]

1. 6 Rec. 66; 12 Barb. 385. 2. In a proceeding to contest the validity of a will, an issue must be made up, "whether the writing produced be the last will of the testator or not," 11 O. S. 329; 2 W. L. M. 84. In such case an issue must be made up to be tried by a jury, and final judgment can not be rendered on demurrer to an answer, 14 O. S. 157; see 17 O. S. 374, § 5861.

CHAPTER II.

TIME OF COMMENCING ACTIONS.

SUBDIVISION I. ACTIONS IN GENERAL—ABATEMENT.

§ 4974. **To what cases this chapter does not apply.** This chapter shall not apply to actions already commenced (1), nor to cases wherein the right of action has already accrued (2); but the statutes in force when the action accrued shall be applicable to such cases, according to the subject of the action, and without regard to the form; nor shall this chapter apply in the case of a continuing and subsisting trust (3), nor to an action by a vendee of real property, in possession thereof, to obtain a conveyance of it. [51 v. 57, § 6; S. & C. 941]

See also §§ 79, 1539, 1542. 1. 11 O. S. 412; 17 O. S. 484, 509. The code applies to proceedings to reverse a judgment rendered before it took effect, 4 O. S. 500. 2. 8 O. S. 428; 11 O. S. 444; 12 O. S. 209; 19 O. S. 413; 28 O. S. 568, 577; 4 C. C. R. 38. 3. It is only between trustee and *cestui que trust* that lapse of time does not constitute a bar, 1 O. S. 478, 507; 28 O. S. 568, 579; 38 O. S. 96. A devise by testator of all his real estate to his son, he to pay testator's daughter a legacy in annual installments, does not create a continuing and subsisting trust, 40 O. S. 27; 11 Bull 248; see also 21 Bull 357; 46 O. S. 349. Trustees of a township holding title to lands granted to them by the general government for school

purposes are not exempt from the operation of the statute of limitations in an action prosecuted by them to recover possession of the premises, 38 O. S. 87; but where the trustee, with knowledge of the *cestui que trust*, disclaims the trust, either expressly or by acts necessarily implying a disclaimer, lapse of time may be relied on as a defense, 1 O. S. 507; see 35 O. S. 317. An action to recover the amount of a general pecuniary legacy with respect to which the executor is not charged with any duty to pay it out of the estate when due is not founded on a continuing and subsisting trust nor exempt from the operation of the statute of limitations, although the will creates some special trusts in the management and disposition of particular property by the executor, 29 Bull 141; 50 O. S. 1. Before the adoption of the code such actions were subject to the statute of limitations. The cause of action accrues when by the terms of the will the legacy becomes payable and the executor has sufficient assets applicable thereto. Where the right of action accrued before the code but has been commenced since, it is governed by the statute in force when the right accrued. *Id.* In order to set the statute running in favor of an executor it is not necessary that he resign or renounce administration of the estate, nor that the legatee have actual notice of the legacy; nor will the bar of the statute be defeated by order of probate court directing final settlement and distribution or by payment of other legacies. *Id.* Express trust continuing, 1 N. P. 169.

Receipt of money by attorney, whose duty it is to pay it to client does not create a continuing, etc., trust, 46 O. S., 349; 51 O. S. 213; nor obligation of partner to account with co-partner after dissolution of firm, 46 O. S. 652, 657; nor right of distributee of estate to receive his share, 5 C. C. 480.

§ 4975. What causes of action survive. In addition to the causes of action which survive at common law, causes of action for mesne profits, or for injuries to the person or property, or for deceit or fraud, shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same. [90 v. 140; 51 v. 57, § 398; S. & C. 1058.]

No cause of action survives against one who so negligently erected a building that it fell and injured another building where he died before the injury, 7 O. S. 369. Before the last amendment a cause of action for wrongfully causing death abated by the death of the wrongdoer, 37 O. S. 372. But death pending the action did not abate it, 1 Clev. R. 122; see § 5144. Injury to "personal estate" under former statute, see 40 O. S. 111; 49 O. S. 66.

§ 4976. Special limitations saved. Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action accrues; but where a different limitation is prescribed by statute, that shall govern. [51 v. 57, § 8; S. & C. 943.]

Decedent's estates, executors, and administrators, see §§ 6097, 6098, 6113, 6115, 6120, 6126, 6139; forcible entry and detainer, see

§ 6599; *habeas corpus*, § 5752; infants, § 5330; mines, § 4378; new trial, § 5309; *quo warranto*, § 6789; railroads, §§ 3276, 3283; revivor of actions, §§ 5157, 5158; revivor of dormant judgment, § 5368; proceedings in error, § 6723; proceedings to vacate judgment, etc., § 5363; taxes, § 5848; will, contest of, § 5866. The provisions of this chapter do not apply to a proceeding in error, 4 O. S. 500.

SUBDIVISION II. ACTIONS CONCERNING REAL PROPERTY.

§ 4977. Actions to recover real estate limited to twenty-one years. An action for the recovery of the title or possession of real property can only be brought within twenty-one years after the cause of such action accrues; and whenever any of the streets or alleys or any part or parts thereof lain [laid] out and shown on the recorded plat or plats of any cities or villages in the state of Ohio, shall not have been opened to the public use and occupancy of the citizens of said cities or villages, or other person or persons, and said streets or parts thereof not opened to public use as aforesaid shall have been enclosed by a fence by the owner or owners of the inlot or lots [or] outlots lying on, adjacent to, or along such streets or alleys or parts thereof not opened as aforesaid, and remained in the open uninterrupted use, adverse possession and occupancy of such owner or owners of such lot or lots lying on, adjacent to, or along such streets or alleys for the period of twenty-one years, and which said streets, alleys, in-lots or out-lots, shall be part and parcel of the tract of land lain [laid] out into such streets, alleys and lots, by the original proprietor or proprietors, laying out said streets, alleys and lots, the public easement therein shall be and the same hereby is extinguished, and the right of said cities or villages, the citizens thereof or other person or persons, and the council of said cities or villages and legal authorities thereof to the use, control or occupancy of so much of said streets and alleys as has been fenced up, used, possessed and occupied as aforesaid is barred to said cities, villages and the citizens thereof and other person or persons except to said owners of said in-lots or out-lots lying on, adjacent to, or along said street or streets, alley or alleys, who have occupied said streets or alleys or parts thereof in manner aforesaid. [86 v. 300; 83 v. 74; 77 v. 303; 51 v. 57; § 9; S. & C. 944.]

This limitation does not apply in actions to foreclose a mortgage, 31 Bull 290; 23 *Id.* 246; see 11 O. S. 42; 14 *Id.* 396; 49 *Id.* 427; it applies in actions to redeem mortgaged premises where possession is held adversely, 3 O. S. 560; see 9 Bull 220; 32 O. S. 49; in actions for dower, 10 O. 24 (act 1810); in an action by trustees of a township holding the title to lands granted to them by the general government for school purposes to recover possession, 38 O. S. 87, 95. The limitation applies to a railroad company raising the grade of its track, and laying an additional track in the street, as against an abutting owner, 40 O. S. 496; to Virginia military lands held under lease for ninety-nine years, renewable forever, 9 O. S. 489. There is no presumption of a grant of lands from mere possession short of twenty-one years, 5 O. 455. The statute does not run in favor of a tenant in common in occupancy of the premises against his co-tenant until some overt act of an unequivocal character clearly indicating an assertion of ownership of the entire premises to the exclusion of the right of the co-tenant, 36 O. S. 232; and it does not run against the heirs of the wife until the termination of the husband's life estate in her lands as tenant by the curtesy, 36 O. S. 584. Statute does not run against remainderman until right of entry accrues to him, 29 O. S. 379. Fencing in highway regularly laid out not such adverse possession as to confer title, 28 O. S. 488; undisturbed possession for more than twenty years no bar to recovery in ejectment on sale for taxes within that period, 7 O. (pt. 1) 262; statute does not run in favor of one in possession while such possession is legal, 29 O. S. 569, 572. Notorious and uninterrupted possession for more than twenty-one years of land dedicated to the city for streets will bar claim of city, 8 O. 298; 5 O. S. 594. Operation of statute defeated by agreement to submit question of boundary to arbitration, 4 O. 310; by agreement of holder with true owner not to sue for possession during their lifetime, 42 O. S. 18. Occupation of line established by agreement for statutory period, binding, 30 O. S. 409. Where the legal estate is in a trustee adverse possession will become a bar against him under the same circumstances that would bar one seized in fee. When an action by such trustee is barred, his beneficiary is also barred, 40 O. S. 365.

‡ 4978. Saving to persons under disability. If a person entitled to bring the action mentioned in ‡ 4977 is, at the time the cause of action accrues, within the age of minority, of unsound mind, or imprisoned, such person may, after the expiration of twenty-one years from the time the cause of action accrues, bring such action within ten years after such disability is removed. [83 v. 74; 51 v. 57, ‡ 10; S. & C. 945.]

See ‡ 3136, 4986. Before the last amendment of this section, 83 v. 74, a married woman came within its saving clause, and her disability, it was held, was not removed by the acts conferring upon her separate property rights, 40 O. S. 603; 43 O. S. 386. In case of a female the disability is removed at the age of eighteen, 3 O. S. 80; so that twenty-one years is to be read eighteen in the statute in such case, *Yaple's Code, etc.*, p. 427. The disabilities extend only to those existing when the cause of action accrues, 30 O. S. 491:

and when the statute begins to run, it continues to run without interruption from any subsequent disability, 13 O. 181, 196; 20 O. 250; 1 O. S. 478; 38 O. S. 374. When it begins to run against an ancestor it continues to run against the heir, though an infant, 1 O. S. 478. On the other hand, the heir or grantee of one protected from the operation of the statute is entitled to its protection, 4 O. S. 464; 13 O. 181; and where the interests of two defendants are joint and inseparable, and the rights of one are saved, such saving inures to the benefit of the other, 1 O. S. 544; 13 O. S. 431; 20 O. S. 208; 24 O. S. 572; but where the rights of each are severable the protection of the statute extends only to those within its provisions, 10 O. 11, as in case of co-parceners or tenants in common, 10 O. 135; 1 O. S. 478; 10 O. 11; but in a proceeding in error, if one of the parties is within the saving clause, the case is saved as to all, 3 O. 49; 12 O. 351; 21 O. S. 131; 17 O. 27. Where the right or estate of children does not accrue until the death of a tenant for life, the statute does not begin to run against them until after his death, 17 O. S. 374.

SUBDIVISION III. OTHER ACTIONS.

§ 4979. **Limitation of other actions.** Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of the action accrues. [51 v. 57, § 12; S. & C. 947.]

The statute commences to run as soon as the injurious act is perpetrated though the actual injury is subsequent and could not immediately operate, 4 O. 331. The rendition of a judgment by a court fixing the annual value of a widow's dower and directing the sale of real estate subject thereto, is not the "accruing" of a cause of action within the meaning of this section, and the statute of limitations does not apply to an action founded on such judgment, 4 C. C. 38. See 10 C. C. 291.

§ 4980. **Within fifteen years.** An action upon a specialty (1), or an agreement, contract, or promise in writing (2). [51 v. 57, § 13; S. & C. 948.]

1. Recognizance for stay of execution, 10 O. S. 514; transcript of foreign judgment, 33 O. S. 52; mortgage, 51 O. S. 240; bill of lading, 13 Bull 893; but not a judgment of a court of this state, 15 O. S. 364. An agreement under seal by one person to pay money to a third, can be enforced by the latter in his own name within fifteen years, notwithstanding such third person is not named in the instrument, 42 O. S. 82. Although an instrument executed prior to April 14, 1884 was not required by law to be sealed, if the maker affixed his signature in front of a scrawl seal at the end thereof, such an instrument is a specialty, 2 C. C. 351. 2. Indorsement of promissory note, 15 O. 130, 133; subscription for stock, 18 O. S. 396; 20 O. S. 190.

§ 4981. **Within six years.** An action upon a contract not in writing, either express or implied (1). An action upon a liability created by statute (2), other than a forfeiture or penalty. [51 v. 57, § 14; S. & C. 948.]

1. On each item of an account, 19 O. S. 454; by surety to recover contribution, 16 O. S. 552, 553; an action against an officer not on his official bond for money received in an official capacity, 21 O. S. 643; for unpaid installments of legacy, 40 O. S. 27; see 11 Bull 247; for money for services, 40 O. S. 214, 217. The ordinary engagements of a married woman competent to bind her separate estate were held not within this section, 9 Bull 63. The statute begins to run from time of collection of money by attorney, 46 O. S. 349; does not apply to railroad wrongfully laying track in public highway, 35 O. S. 1; nor where money is placed in hands of defendants intestate upon the express trust to be repaid to plaintiff on the death of the intestate, 36 O. S. 181; whether assessment within provisions of section not determined, 50 O. S. 208; held six years in 1 C. S. C. R. 262. 2. Action to enforce individual liability of stockholders, 40 O. S. 507; see 15 Bull 164; 8 Bull 296; against railroad company for injury to stock by neglect to fence, 41 O. S. 12; 15 Bull 102. For destruction of county bridge, by corporation, the statute begins to run from its restoration by the commissioners, 43 O. S. 451. In actions upon a stockholder's liability the statute of limitations commences to run when the company is insolvent, 40 O. S. 514; 15 Bull 164; 8 Bull 296; and the claim is determined and enforceable against stockholders, 15 Bull 164; reduced to judgment and execution returned unsatisfied, 49 O. S. 438; 46 O. S. 1; 47 O. S. 180.

‡ 4982. Within four years. An action for trespass upon real property (1); but in an action for trespass under ground or injury to mines, the action shall not be deemed to have accrued until the wrong-doer is discovered. An action for the recovery of personal property, or for taking, detaining, or injuring the same; but in an action for the wrongful taking of personal property, the cause of action shall not be deemed to have accrued until the wrong-doer is discovered (2). An action for an injury to the rights of the plaintiff not arising on contract and not hereinafter enumerated (3). An action for relief on the ground of fraud; but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud (4). [81 v. 210; 51 v. 57, ‡ 15; S. & C. 948.]

1. *Trespass.*—Action for temporary injury by changing grade of railroad track and laying additional track in highway, causing overflow of abutting owner's land, 40 O. S. 496. There is no distinction between trespasses underground and upon the surface; nor where the cause of action is known or unknown to plaintiff within the time limited by the statute, 37 O. S. 583. When a man commits an act of trespass upon another's land, and thereby injures such other at once and to the full extent that such act will ever injure him, the statute of limitations runs from the time of such act of trespass; but where the act of trespass is continuing, the action may be brought at any time until by adverse use or possession the trespasser has acquired an

adverse right.—Action for diversion of stream by railroad, 43 O. S. 626. Neither the limitation of four or six years applies to railroad wrongfully laying track in public highway, 35 O. S. 1. Action against railroad for damages caused by occupying public street in pursuance of municipal authority must be brought in two years under § 3283, 35 O. S. 284.

2. *Taking personal property.*—Action for wrongful taking by force personal property not within meaning of last clause of the section, "for relief on the ground of fraud," 19 O. S. 462.

3. *Injury to rights of plaintiff.*—Action for wrongfully depriving mortgagee of security—whether such action is for tort or relief on the ground of fraud, 35 O. S. 307; for injury to mortgagee by laying railroad track in front of mortgaged premises, 17 Bull 153, 154 (C. P.); action for injury causing death—deceased received injury in 1877 and died in 1883—cause of action accrued at time injury was received and barred in four years from the time of the injury, 2 C. C. R. 45.

4. *Fraud.*—Action by maker of promissory note to cancel the same for fraud limited to four years after discovery of fraud, 26 O. S. 559; by creditor to set aside fraudulent conveyance, 82 O. S. 228, 234. Time does not run against a *cestui que trust* until he has knowledge of the trust, 10 O. S. 198; nor against an infant for the wrong of his guardian *ad litem* until the discovery of the wrong, 17 O. S. 485; and in a proceeding to reform an instrument on the ground of mistake, lapse of time is reckoned only from discovery of mistake, 11 O. S. 653. Under the act of 1831, and under the code prior to 1867, fraudulent concealment of the cause of action did not prevent the running of the statute, 4 O. 331; 10 O. 469; 6 O. S. 276; 19 O. S. 462. An action for specific performance against the heirs of the vendor and his grantee who took the legal estate with notice is not an action for relief on the ground of fraud within the meaning of this section, 31 O. S. 188. Fraudulent conveyance, 21 Bull 212. The statute begins to run from the time of the discovery of the fraud and not from the time of its commission, 40 O. S. 313. When an executor parted with the assets of his testator's estate, in violation of an agreement with a judgment creditor of his testator, under such circumstances as to constitute fraud, and render himself personally liable to the creditor, the statute does not begin to run in favor of the executor until the creditor had notice of the act of the executor in parting with funds, 40 O. S. 529. Action to impeach settlement for fraud within the section, 48 O. S. 219. Want of knowledge does not prevent running of statute, 49 O. S. 188.

§ 4983. **Within one year.** Within one year: An action for libel, slander, assault, battery, malicious prosecution, false imprisonment or malpractice. An action upon a statute for a penalty or forfeiture; but where a different limitation is prescribed in the statute by which the remedy is given, the action may be brought within the period so limited. [91 v. 299; 51 v. 57, § 16; S. & C. 949.]

An action to recover money lost or paid on a bet or wager is an action upon a statute for a penalty or forfeiture, 29 O. S. 547. An action against a county treasurer on his bond to enforce the statutory liability is subject to the limitation in § 4984, 32 O. S. 421.

Actions to recover back taxes and assessments must be brought within one year, § 5848; 44 O. S. 51.

§ 4984. Actions on official and other bonds. An action upon the official bond or undertaking of an officer (1), assignee, trustee, executor, administrator, or guardian, or upon a bond or undertaking given in pursuance of a statute, can only be brought within ten years after the cause of action accrues; but this section shall be subject to the qualification in § 4976. [51 v. 57, § 17; S. & C. 949.]

1. 16 O. S. 80, 522; 32 O. S. 421. An action against an officer not on his official bond is barred in six years, 21 O. S. 643. An action against a sheriff for not paying over money does not accrue until demand, 22 O. S. 27.

§ 4985. Ten years. Other relief. An action for relief not hereinbefore provided for can only be brought within 10 years after the cause of action accrues. [51 v. 57, § 18.]

Action to enforce lien on R. R., etc., 2 N. P. 15; of surety to be subrogated to rights of creditor in judgment, 23 O. S. 483.

An action under § 5370 to make members of a partnership against which a judgment has been rendered by its firm name, parties to the judgment is within the provisions of this section, 40 O. S. 37; and an action by a partner against a co-partner for an account after dissolution, 46 O. S. 652, 662; an action on agreement with mother of adopted child to provide for latter, etc., 1 C. C. 216, and to reform an instrument on the ground of mistake, 48 O. S. 209. The cause of action accrues upon the execution of the instrument. *Id.* And actions to charge the separate estate of a married woman upon her verbal promise, 9 Bull 63, 64 (C. S. C. 1883). The section is not applicable to an action against an officer not on his official bond, 21 O. S. 643; nor to an action brought on a judgment rendered in another state, 33 O. S. 52; nor to an action by a surety for contribution, 16 O. S. 552. Surety's right to revive judgment is not barred until twenty-one years from the time the judgment became dormant, 36 O. S. 155.

§ 4986. Rights saved to certain persons. If a person entitled to bring any action mentioned in this subdivision, except for a penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority, of unsound mind, or imprisoned, such person may bring such action within the respective times limited by this subdivision after such disability is removed. [83 v. 74.]

See §§ 3136, 4978. Provisions of this section except persons named from operation of § 4979. When time begins to run, 10 C. C. 291. The statute is personal and can not be extended to any party not within its saving, 10 O. 135. A married woman is not now within the saving clause of this section. Before the last amendment it was held that an action by an assignee of the claim of a married woman against her husband for moneys belonging to her and converted by the husband to

his own use was not barred by the limitations of § 4978 where less than six years intervened between such assignment and the commencement of the action, 37 O. S. 390.

SUBDIVISION IV. GENERAL PROVISIONS.

§ 4987. **When action deemed commenced.** An action shall be deemed commenced, within the meaning of this chapter, as to each defendant, at the date of the summons which is served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him; and when service by publication is proper, the action shall be deemed commenced at the date of the first publication, if the publication be regularly made. [51 v. 57, § 20; S. & C. 949.]

What steps to enforce a lien will be deemed a commencement of an action within the meaning of this section, 24 O. S. 628. Statute of limitations ceases to run against a set-off from the date of the commencement of the action in which it is pleaded, 36 O. S. 152. Action for recovery of specific personal property can not be defeated by assignment for benefit of creditors, 33 O. S. 523, 529. Computation of time ends with the filing of the original and not the amended petition, 41 O. S. 145. The defendants in an action against vendor and vendee to set aside and cancel a deed on the ground of fraud, though both defendants, are necessary parties defendant, yet where the only relief sought is a cancellation of the deed, are not united in interest, within the meaning of this section, 39 O. S. 563. The section furnishes by analogy the rule which determines when proceedings in error are to be deemed commenced, 16 O. S. 284; 21 O. S. 131; 36 O. S. 312; 37 O. S. 544. An action is deemed commenced at the time of the summons which is served on the defendant, and although a demurrer is sustained to the petition, and leave given to amend, the action remains "commenced," and an averment as to the discovery of the fraud within four years before the action was brought may be supplied in a subsequent amendment to the petition, 29 Bull 391; 50 O. S....

§ 4988. **When attempt equivalent to commencement; service in such case—Service upon corporation passing into hands of receiver—Railroad company.** An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this chapter, when the party diligently endeavors to procure a service; but such attempt must be followed by service within sixty days. And if the defendant is a corporation, whether foreign or created under the laws of this state, and whether the charter thereof prescribes the manner and place, or either, of service of process thereon, and such corporation passes into the hands of a receiver before the expiration of said sixty days, then service following such attempt to commence the action may, within said sixty days, be made upon such receiver, or his cash-

ier, treasurer, secretary, clerk or managing agent, or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such agents or officers of such receiver with the person having charge thereof; and if such corporation is a railroad company, summons may be served upon any regular ticket or freight agent of said receiver, and if there is no such agent, then upon any conductor of said receiver, in any county in the state in which such railroad is located, and the summons shall be returned as if served upon said defendant. [91 v. 72; 51 v. 57, § 20; S. & C. 949.]

The act as last amended March 16, 1894, applies to pending cases. Applicable to proceedings in error, 35 Bull 46.

No time is fixed for service by publication in attachment, summons returned "not found," 41 O. S. 271. Leaving copy of summons at defendant's place of business is not a sufficient service upon an individual defendant. The record shows an attempt to commence an action not followed by service of summons within meaning of this section, 25 O. S. 336, 339; see 2 C. C. R. 140.

§ 4989. Absence from state when cause of action accrues. Absence afterwards. If, when a cause of action accrues against a person, he is out of the state, or has absconded, or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought. [51 v. 57, § 21; S. & C. 950.]

Cases under the statute of 1831, and other statutes, 9 O. 34; 11 O. 255, 690; 13 O. 430; 14 O. 204. Where a person, who is a non-resident of this state and absent from it when a cause of action accrues against him in favor of another in this state, afterward and during the period of the limitation, occasionally comes into this state, such presence in the state will not set the statute of limitations to running in his favor, although the plaintiff might, at such times, by the exercise of ordinary diligence, have commenced an action against him, 47 O. S. 225. The effect of changes in the statute enlarges the operation of its provisions, 22 Bull 63. Disability of absence removed, when, 52 O. S. 103.

§ 4990. Action barred where it arose, barred in this state. If, by the laws of the state or country where the cause of action arose, the action is barred, it is also barred in this state. [51 v. 57, § 22; S. & C. 950.]

And this was the rule under former statutes, 7 O. (Pt. 1) 246; 14 O. 437; 16 O. 145; 11 O. S. 690. The section does not apply if

a party leave the state where the cause of action arose and come into this state before the right of action accrues, 7 O. (Pt. 1) 229.

§ 4991. **Saving in case of reversal, etc.—Service upon corporation passing into hands of receiver—Railroad company.** If, in an action commenced, or attempted to be commenced, in due time a judgment for the plaintiff be reversed, or if the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has, at the date of such reversal or failure, expired, the plaintiff, or, if he die and the cause of action survive, his representatives may commence a new action within one year after such date, and this provision shall apply to any claim asserted in any pleading by a defendant. And if the defendant is a corporation, whether foreign or created under the laws of this state, and whether the charter thereof prescribes the manner and place, or either, of service of process thereon, and such corporation passes into the hands of a receiver before the expiration of said year, then service to be made within said year following such original service or attempt to commence the action may be made upon such receiver or his cashier, treasurer, secretary, clerk or managing agent, or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such agents or officers of such receiver with the person having charge thereof, and if such corporation is a railroad company, summons may be served upon any regular ticket or freight agent of said receiver, and if there is no such agent, then upon any conductor of such receiver, in any county in the state in which such railroad is located, and the summons shall be returned as if served upon said defendant. [91 v. 73; 51 v. 57, § 23; S. & C. 950.]

This act as last amended March 16, 1894, applies to pending cases. A party failing otherwise than on the merits in the court below may on affirmation of the judgment of the court below and within one year after such affirmation commence a new action under this section, 31 Bull 140. See 9 C. C. 718.

If service is set aside, plaintiff may, within a year, bring his action anew, notwithstanding the time allowed for commencing the action may have expired between the time of instituting proceedings and the setting aside of the service, 17 O. S. 225; and where an action is dismissed without prejudice to a future action, plaintiff may commence it anew, within a year, notwithstanding the time limited for commencing the action had expired at the time of the dismissal, 12 O. S. 620. The section

relates to the time within which an original action may be commenced, or claims set up by the defendant in such an action may be reasserted, if either party fail otherwise than upon the merits, and has no application to proceedings in error, 34 O. S. 537. Dismissal of action without prejudice to future action does not extend period of limitation prescribed as to such action, 7 C. C. 33. A voluntary dismissal of an action by plaintiff not occasioned by any adverse ruling of the court or compulsion of any kind is not a failure otherwise than upon the merits within the meaning of this section, and if the time limited for the commencement of such action has expired the plaintiff can not commence a new action within one year after such dismissal. *Id.* Where an action which has been commenced in due time is dismissed by the plaintiff after the time limited for the commencement of such action has expired, a new action for the same cause thereafter commenced is barred though commenced within one year after the dismissal of the former action. Such dismissal is not a failure in the action within the purview of this section, 50 O. S. 294; 29 Bull 406.

§ 4992. Part payment. New promise, etc., in writing. When payment has been made upon any demand founded on contract, or a written acknowledgment thereof, or promise to pay the same, has been made and signed by the party to be charged, an action may be brought thereon within the time herein limited, after such payment (1), acknowledgment (2), or promise (3). [51 v. 57, § 24; S. & C. 951.]

1. Payment by principal inures to surety, 37 O. S. 388, and part payment by an administrator, under act 1804, inures to intestate, 13 O. S. 271; but part payment of a joint and several note by one of several makers will not inure to the others, 25 O. S. 349, and payment of a dividend by an assignee of an insolvent debtor is not part payment within the meaning of this section, 16 O. S. 566. Each item of an account is barred in six years unless there has been a part payment and acknowledgment of liability thereon, or a promise to pay in writing, 19 O. S. 454. A credit on an account after the cause of action on the same is barred is not part payment unless shown to have been so intended, 31 O. S. 424. Payment on open book account when not part payment, etc., within the meaning of the statute, 4 C. C. 289. A petition against several makers of a joint and several note more than fifteen years past due, whereon payments have been made within the time of the statute, but by whom paid not appearing, does not show a statutory bar in favor of any of the defendants, 29 O. S. 245.

2. 40 O. S. 637. The presumption of payment at common law, arising from lapse of time, may be rebutted by proof that the debtor, within the period required to raise such presumption, acknowledged such claim to be an existing liability, 16 O. S. 498. Under the acts of 1824 and 1831, acknowledgment of the debt and a promise to pay it after it was barred, did not revive the original cause of action, and the action, it was held, must be on the subsequent promise, 17 O. 9.

3. A verbal promise is not sufficient, 1 C. S. C. R. 324; but was before the code, 19 O. S. 413. The plaintiff may set up the barred demand as a consideration for the new promise, and allege the new promise as the cause of action, 8 O. S. 215, 220. Promissory

note made by partner after dissolution in consideration of balance due on an account with firm before dissolution is not, in absence of express authority to execute it, such a promise in writing, as will, under this section, take the demand on the account out of the statute, as against the other members, 48 O. S. 613. No action can be maintained by the holder against the maker of a promissory note, the action on which is barred by the statute of limitations, on a verbal promise to pay the same, made after the bar of the statute had arisen, the consideration of the promise being the original debt, 7 C. C. 147.

General Principles. The statute of limitations must be set up as a defense or is deemed waived, 8 O. S. 215, 423; 4 O. S. 272; 13 O. 430; 29 O. S. 245; 30 O. S. 184; but not in actions for the recovery of real property, 11 O. S. 442, 444. It may be taken advantage of by demurrer, 8 O. S. 215, 423; 16 O. S. 498, 504; 18 O. S. 49, 67; 22 O. S. 27, 30; 26 O. S. 131; 29 O. S. 245, 249. Lapse of time in equity may be so taken advantage of, 1 O. S. 478. Courts of equity act in analogy to the statute of limitations, 3 O. S. 551; 10 O. 24, 26; 14 O. 437, 443; 6 O. 96; 10 O. 498, 523, 524; 13 O. 430; 14 O. 320, 343. As between trustee and *cestui que trust* lapse of time is not a bar, 16 O. 66; 11 O. S. 42, 46; 2 O. S. 336; 1 O. S. 478; 5 O. S. 122; 10 O. S. 198; 28 O. S. 508, 568, 578. The statute does not apply where the state is a trustee, and the beneficiaries have no right to sue, 16 O. S. 11. Time does not run against the government. *Id.* 1 C. C. 86. It runs against a municipal corporation, 8 O. 298; 1 O. S. 478, 510; 5 O. S. 594; 13 O. S. 42. The plea was a defense not favored and defendant in default would not ordinarily be permitted to set it up, 12 O. 120; but it was discretionary with the court, 18 O. 240. It is now admitted after default, 44 O. S. 12. It is no defense to an action on a collateral security that the original claim is barred, 17 O. S. 319. Neglect of creditor, whereby estate of one surety is released under the statute does not release co-surety, 20 O. S. 337. While the legal title to land remains in the government, the statute of limitations does not run against one who holds a certificate of survey or of purchase, 16 O. 34. Where a patent for land issuing from the government of the United States in the name of a deceased person is void, and is afterwards cured by a subsequent act, the statute of limitations does not begin to run until the latter act, 7 O. S. 288. The possession of a mortgagor, or of those claiming under him, continuing in the occupancy of the mortgaged premises, acknowledging the subsistence of the mortgage, is not adverse to the rights of the mortgagee and will not ripen into a title superior to the mortgage, 24 O. S. 97. Actions upon causes of action accruing outside of this state and not limited by the law of the place where they accrued, or limited thereby to longer periods than those specified in our statute, are governed as to limitations by the Ohio statute, in like manner as causes of action accruing within the state, 26 O. S. 46. Where plaintiff in ejectment shows the original grantee to be within the exception of the statute of limitations, the fact that other grantees are not within such exception must be pleaded by the defendant, 2 O. 339. When one party to writ of error is within the saving clause of the statute of limitations the case is saved as to all the parties, 8 O. 49; 12 O. 352. The terms "beyond the state," in the statute of limitations of 1804, are equivalent to "without the limits of the state," 6 O. 126. Where a corporation wrongfully transferred the stock of certain stockholders, it was held that until the transfer of the stock to the holders of the original certificate was refused, or they had notice of the transfer of the stock to other parties, the statute of limitations did not begin to run, 35 O. S.

484. Where the legal estate is in a trustee competent to protect it, adverse possession will become a bar against him under the same circumstances that would bar one seized in fee in his own right. When an action by such trustee is barred, his beneficiary is also barred, 40 O. S. 365.

When statute commences to run. When time begins to run against the ancestor, it continues to run against the heir, 1 O. S. 478; 6 O. 35. Prior to the code equity followed the law in determining when time would begin to run against the right of a mortgagor to redeem, and when such right would be barred, 32 O. S. 49. Title by prescription may be acquired by twenty-one years adverse enjoyment of an easement, and the period begins to run from the time the right of action accrues, 22 O. S. 247. The statute does not begin to run until a patent has issued from the government empowered to make the grant, 7 O. (pt. 1) 249, s. c.; 6 O. 366; 16 O. 34. When it begins to run, it continues to run, without interruption from subsequent disability, 13 O. 181. Lapse of time in equity only reckoned from discovery of existence of trust, fraud or mistake, 10 O. S. 198; 11 O. S. 653; 27 O. S. 159; but fraudulent concealment could not be set up in an action at law to enlarge the statute, 10 O. 469; 6 O. S. 276; 19 O. S. 462. It will not begin to run against a pledgor where the pledge remains in possession of the pledgee until tender of the debt and refusal by the pledgee to restore the pledge upon demand, 26 O. S. 181. In contest of will as to new parties from filing of petition, 20 O. S. 208. In error proceedings from date of summons, 16 O. S. 284.

What may defeat operation of statute. Agreement to submit question of boundary to arbitration defeats operation of statute, 4 O. 310. Possession necessary to bar recovery of real property, need not be continuous for the period of limitation in any one occupier, 22 O. S. 32. Possession must be actual, notorious, continued, exclusive, and adverse, but color of title not necessary, 8 O. 159; 6 O. 164; 17 O. S. 130; 22 O. S. 32. Occupation to confer title must have continued substantially in same mode, 10 O. 288. Possession under tenant for life not adverse as against remainderman, 29 O. S. 379. Possession for twenty-one years no bar to recovery upon a sale for taxes made within that period, 7 O. (pt. 1) 262. A devised land to a tenant for life which was then to be sold and proceeds divided among his children; estate of tenant determined in his lifetime. Held that possession prior to such tenant's death would not affect the right of the children, 17 O. S. 374. As between the estate of a deceased debtor and the creditors, the statute does not run against their claims after they have been presented to and allowed by the executor or administrator, 29 O. S. 569. Party procuring injunction to restrain bringing action until limitation expires, can not after dissolution plead statute of limitation as a bar to such action, 29 Bull 317; 50 O. S. 197. Can not defeat claim of State, 1 N. P. 292.

CHAPTER III.

PARTIES TO ACTIONS.

‡ 4993. **Action in name of real party in interest.** An action must be prosecuted in the name of the real party in interest, except as provided in sections forty-nine hundred and ninety-four and forty-nine hundred and ninety-

five; but when a party asks that he may recover by virtue of an assignment, the right of set-off, counter-claim, and defense, as allowed by law, shall not be impaired. [51 v. 57, §§ 25, 26; S. & C. 951, 952.]

Real party in interest.—The real party in interest is the party who would be benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation, 5 W. L. M. 80. One of the principal changes effected by this section of the code is the right conferred upon the assignee of a chose in action to sue in his own name. Under this provision an assignee of an account may sue thereon, and where the assignment is absolute the assignor is not a proper party to the action, 11 O. S. 374; the assignor can not, therefore, sue in his own name, 36 O. S. 68. An assignee of a judgment obtained in a garnishee process may maintain an action in his own name, 18 O. S. 134. The assignee of a reversion and covenants contained in a lease is the proper party to bring an action to recover for their breach, 9 O. S. 340; 42 O. S. 180; an assignee of stock of a corporation, to compel the issuance of a stock certificate, 41 O. S. 321; an assignee, by indorsement of a promissory note, though without equitable interest, may sue in his own name, 29 O. S. 423; but an assignee of a note by mere delivery and for the purpose of collection can not maintain an action in his own name, 26 O. S. 425; and where an assignment without indorsement, though for value, was made after maturity, it was held a good defense by the equitable owner to show that the assignee was not the real party in interest, 43 O. S. 284; see 74 N. Y. 486; but it is a general rule that the indorsee or payee of a note, though an agent, holding the legal title, may, under this section, sue on it in his own name, 47 N. Y. 345, reversing 57 Barb. 179, 189; 20 Ia. 481, 485, Dillon, J.; and where the assignment was without consideration the assignee to be accountable for all the proceeds, 44 N. Y. 228, 231; see 29 O. S. 423, in writing absolute and by co-temporaneous agreement the assignees were to have one-half of the proceeds, 14 N. Y. 322; where the assignment was made as collateral security, 41 Cal. 294; where the assignment was of a promissory note payable to order without indorsement, 14 Minn. 27; see 3 Kas. 295 (though subject to equitable defenses or claims against the payee, 11 Kas. 464); the assignee has been, in all such cases, allowed to sue in his own name. In one case the defendant was allowed to set up as a defense that the payee of the note assigned it to the plaintiff to secure an indebtedness which had been paid, 11 Ind. 464; but where the indorsement was for collection, or without consideration, the indorsee was permitted to sue in his own name, 50 Ind. 319. Action must be prosecuted, etc., 51 O. S. 444.

Prior to the code, the assignee of part of an entire demand could not sue at law, 13 O. S. 495, 501; see 14 O. 606; the action could only be brought in the name of the assignor, 2 B. Mon. 82, and it was so held under the code, 21 Mo. 133; but it is the rule generally under the code that the assignee of part of a demand is entitled to relief by making the assignor a party, 38 Cal. 514; 47 Ind. 51; and when he refuses to join as plaintiff he may be made a party defendant, 38 Cal. 514; see 11 O. S. 374, 378.

The test of the assignability of a claim is whether it survives or not. Causes of action which survive to the personal representative are assignable, and those which do not are not assignable, Pomerooy Rem. § 147. As illustrations of those, arising out of contract,

which are assignable, are the following: A contract of guaranty, 1 Bosw. 352; 16 O. S. 145; a contract to pave streets, 5 O. S. 520; right of a borrower to recover back excessive interest upon a usurious loan, 64 N. Y. 242; a contract for the hire of the service of state prison convicts, 23 N. Y. 350; the right of an officer to his fees, 14 Abb. Pr. 178; 17 O. S. 591, or salary, 27 O. S. 393; a right of action to recover back money lost in gaming, 19 N. Y. 26; contra, 22 Barb. 82; the right of a widow to her dower before admeasurement, 12 Ind. 37; right to a trade mark, 2 Daly 521; a judgment of damages for the commission of a tort, 11 Ia. 329; a claim in expectancy, 6 N. Y. 179, if it is not a mere possibility, as an heir apparent's chance of succession, 25 O. S. 283, 300; 7 O. S. 432; a bail bond, W. 180 (29 L. 62), and bill of lading, 2 C. S. C. R. 291, may be assigned; but a contract for marriage, 1 Pick. 71, is not assignable, nor a contract of apprenticeship, 1 Mass. 72, nor contracts stipulating for the performance of services by an attorney or medical practitioner, 13 N. Y. 333; nor an executory contract for personal services without the employer's consent, 31 O. S. 421, nor a vendor's right of lien, 24 O. S. 402; 21 Cal. 172, 178; nor a wife's inchoate right of dower, 8 N. Y. 110; 27 O. S. 50, 65; a tenancy at will, 27 O. S. 478, nor a right of way, 23 O. S. 614.

Claims arising from torts may be assigned, as a claim for fraudulently inducing one to enter into the marriage relation, 9 Mo. 497; for fraud or deceit in contracts relating to the sale of real or personal property, 19 N. Y. 464; 24 N. Y. 607; contra, 13 N. Y. 322; a claim by a principal against an agent for negligence, 8 O. S. 1; a right of action to recover damages for the conversion of personal property, 12 N. Y. 622; a demand for compensation arising from injury to land, 1 D. 58; against a railroad company for negligently killing cattle, 22 Barb. 110; a right of action against a sheriff for neglecting to arrest defendant upon a body execution, 38 Barb. 18; against a bank for neglecting to make proper demand of a note left for collection, and to take proper steps to charge indorsers, 6 Robt. 337; a claim under a statute for damages caused by wrongful death, 15 N. Y. 432. It belongs to the next of kin in Ohio, 26 O. S. 522. But personal torts, which die with the person, are not assignable, 8 O. S. 1, as claims for malicious prosecution, 34 Wis. 259; a claim against a justice of the peace for nonfeasance, 12 O. S. 181, 184; a verdict in an action for a personal tort, 15 Abb. Pr. 342.

Since the third person for whose benefit a promise is made is the real party in interest, he may sue on such promise, and therefore, where a promise is made by A to B for a consideration moving from B to pay C a sum of money, C may maintain an action upon the promise in his own name against the promisor without joining the promisee, 15 O. S. 148; 42 O. S. 82; 22 Ia. 470.

Assessment. An action for an assessment should be in the name of the municipal corporation, ‡ 2286; 2 C. S. C. R. 296; 26 O. S. 275; 42 O. S. 128. If the assessment is assigned to a contractor, he may maintain an action in the name of the city, 31 O. S. 246, but not in his own name, 2 C. S. C. R. 296 (1872); but contractors may, under the statute 1876, sue in their own names for the collection of street assessments where the municipal corporation is a proper party defendant, 42 O. S. 586. Several owners of land assessed for a street improvement may join in an action to restrain its collection, 24 O. S. 233; see 23 O. S. 625; 38 O. S. 314. The owner of property may enjoin an assessment, where there is a "substantial defect in the improvement," under ‡ 2289 in an action against the treasurer and municipal corporation, and §§ 1777 and 1778 have no application to such case, 38 O. S. 314.

Bailment. A consignor named in a bill of lading may maintain an action for an injury to the goods, although he has no property general or special therein, 8 Gray, 281. A bailee of goods may sue a carrier for delivering to the consignee without payment, that being imposed as a condition of delivery, 55 N. H. 548; possession of goods acquired by plaintiff under a bill of lading is sufficient to enable him to maintain an action against one who does not show a better title, 100 Mass. 515; a consignee may sue a carrier for loss of or damage to goods delivered to it for transportation, 67 Ill. 84; Id. 543. An action for injury to sheep while in possession of a lessee during the term of bailment must be maintained by the lessee, 49 Cal. 612; a bailee having charge of a race-horse for the season may maintain an action for an injury to the horse while racing, 40 Mich. 592; 29 Am. Rep. 562. Where a creditor living at a distance from his debtor requests the payment of a debt without giving specific instructions as to how the money shall be sent, and the debtor sends it by an express company and it is lost *in transitu*, the debtor may maintain an action against the company for its recovery, 40 O. S. 451.

Bankruptcy. In case of bankruptcy the right of action passes to the assignee, 36 O. S. 68; 40 O. S. 629. Upon a suit by one partner against a copartner for dissolution of copartnership upon the bankruptcy of plaintiff being shown, his assignee will be allowed to be substituted as plaintiff, 4 Ben. 92. If an assignee refuses or neglects to sue for property fraudulently transferred, the creditors may do so and make the assignee, the debtor and transferee parties, 72 N. Y. 70.

Bills and notes—see assignee. The party having the right to the money is the proper person to sue, 3 Bosw. 560; the real owner may sue though the note is made to order and not indorsed, 12 Kas. 570; 19 O. S. 536; the holder is presumed to be the owner in the absence of evidence to the contrary, and is entitled *prima facie* to sue thereon, 3 McLean 101; but it is a good defense to show, where the assignment was made after maturity, that the assignee was not the real party in interest, 43 O. S. 284; 48 O. S. 1, 21. The holder of a note without indorsement and for collection merely can not sue on it in his own name, 26 O. S. 425, otherwise if he were to have part of the proceeds, 1 Bull 170; a bona fide indorsee may sue thereon, 16 Abb. Pr. 146; an indorsee may sue thereon, though, for a consideration to be paid after collection, 25 N. Y. 625, and though without equitable interest, 29 O. S. 423. One holding notes as trustee for himself and others may sue thereon in his own name, 29 O. S. 330, and one to whom the legal title in a note and mortgage has been transferred for collection in his own name may sue thereon in his own name, 3 Bull 365; 7 Rec. 9. Where a note was made payable to A as administrator of B, on A's death his administrator, and not the administrator *de bonis non* of B, is the proper party to sue on it, 7 O. (Pt. 1) 268.

Constable may sue justice for irregularly replevying goods held by him on execution, 1 Bull 234.

Contractors may sue in their own names for assessments under act 1876, 42 O. S. 585.

Conversion. A bailee may sue for conversion, W. 744; a mortgagor of chattels, W. 552; a sheriff must sue alone for conversion of attached property, 17 O. S. 183; a pledgor may sue a pledgee for conversion without making a tender, 1 H. 532; a tenant in common may sue a cotenant for conversion of the whole property, 66 Barb. 564.

Corporation. after dissolution, could not sue; the receiver only could sue in its name, 13 O. 269. By statute a dissolved corporation may sue in its own name, ‡ 5683, and be sued by its corporate name, ‡ 5684. Trustees of a corporation must sue as such and not in their individual names, 13 O. 250.

Death by negligence. The personal representatives bring the action; the widow and next of kin can not maintain it in their own names, 26 O. S. 522; the action can not be maintained when the death occurs outside of this state, 2 C. S. C. R. 82; 25 O. S. 667; an administrator in this state can not maintain the action under the statute of another state, 10 O. S. 121.

Ejectment. The owner of the legal title only can maintain ejectment in this state, ‡ 5781; see 2 Neb. 79, under a similar statute. (In Kansas the owner of the equitable title may maintain ejectment, 16 Kas. 248.) A reversioner, 5 O. 28; a tenant by the curtesy, 32 O. S. 184; trustees of a religious society, 13 O. 129; 12 O. S. 248; a mortgagee after condition broken, 2 O. 223; 7 O. (Pt. 2) 70; a wife for property decreed her as alimony, W. 205, 1 O. S. 405, may maintain ejectment. Formerly the husband should be joined with the wife in a suit for the possession of the wife's land not her separate property, 20 O. S. 128.

Fraudulent conveyance. A judgment creditor of an insolvent corporation, though the corporation has been dissolved and a receiver appointed, may maintain an action in the nature of a creditor's bill, the receiver neglecting or refusing to do so, to set aside a sale made by a corporation previous to dissolution for the purpose of defrauding its creditors, 40 O. S. 575.

Insurance. Where a policy is on account of whom it may concern, the person to whom it is issued may sue on behalf of all the owners in his own name as trustee of an express trust, 6 O. S. 554; 26 O. S. 664; if such person die, his personal representatives may sue, 65 Me. 385. An assignee of a life insurance policy may sue on it in his own name, 38 Wis. 542. One who has obtained a valid insurance upon his own life may dispose of it as he sees fit in the absence of prohibitory legislation or contract stipulation; it is immaterial in such case that the assignee has no insurable interest in the life, 41 O. S. 232. Taking in of partner not a transfer avoiding policy, and assured may recover in his own name damages sustained on account of injury done to his share of the property, 48 O. S. 533.

Landlord and tenant. An assignee of the reversion, and of covenants contained in a lease, may sue, in his own name, for a breach thereof, 9 O. S. 340; 42 O. S. 180.

Legatee may sue on the bond of an executor or administrator for non-payment of his legacy, ‡ 6211, and may bring an action, in his own name, under ‡ 6212, for the benefit of the estate on such bond, 38 O. S. 650, and may sue a purchaser of land charged with legacies, 32 O. S. 358; party plaintiff after distribution, 32 O. S. 334.

Liquor laws. Under ‡ 4357, every husband, wife, child, parent, guardian, employer, or other person injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication of any person, shall have a right of action, in his or her own name, severally or jointly, against the persons causing the intoxication, in whole or in part; and under ‡ 4361 a married woman shall have the right to bring suit therefor, and control the same as a *femme sole*.

Municipal corporation a proper party plaintiff in a suit to enforce an assessment for a municipal improvement, ‡ 2286; 2 C. S. C. R. 296; 26 O. S. 275; 42 O. S. 128.

Non-resident property owner may enjoin laying of street railroad in front of his premises where the proper consents have not been obtained, 19 O. S. 78.

Parent and child. Where the father and mother, living apart by agreement, transfer the care and custody of their infant children to the grandfather of the children, in consideration that he will receive, and in pursuance of that agreement he does take, them in charge, the grandfather may maintain an action for damages against one who wrongfully takes them from his custody, 32 O. S. 299.

Penalties. The action is in the name of the state, 2 Clev. R. 44; see 2 W. L. M. 316; but where a right of private action is given by statute, a civil action, in the name of the party, is the proper remedy, unless it is otherwise specially provided, 37 O. S. 265, 271.

Public officer can not sue in his individual name, 31 O. S. 317; 20 O. 340; 8 O. 174.

Public right. A private party can not enforce, 6 O. 101, unless he has a special interest, 6 O. 298; 7 O. (Pt. 1) 217.

Recognizance. The action is in the name of the state, 10 Rec. 307; 29 O. S. 452; 21 O. S. 183.

Rescission. One not a party to a life policy can not avoid it for fraud, nor recover back the premiums paid thereon, 33 O. S. 533.

Seduction. The father sues for the seduction of the daughter as for loss of service, 10 Mo. 634. If the father is dead, the mother may sue when a minor child is seduced while in the service of another, the wages being paid to the child, on the ground that she is responsible for her support, 56 N. Y. 435. A wife may sue for the seduction of her husband, 34 O. S. 621.

State is the proper party plaintiff in actions on official bonds, 10 O. S. 515; 32 O. S. 421; 25 O. S. 567, in actions on penalties, 2 Clev. R. 44; see Penalties; in prosecutions for contempt, 6 W. L. J. 538; in an action to compel the performance of a statutory condition, 36 O. S. 434, on subscriptions to canal commissioners, 5 O. 56. A sister state may sue in the courts of this state, 1 O. 259.

Tax-payer may enjoin the collection of illegal taxes, §§ 5848-5851, the misapplication of the funds of the county on failure on written request of the prosecuting attorney to act, § 1278, and may enjoin the misapplication of the funds of a municipal corporation on failure on request of the city solicitor to act, § 1778, bringing the action in the name of the state in the former, § 1278, and in his own name on behalf of the city in the latter, case, 2 C. S. C. R. 44. He may enjoin the performance of an unlawful contract with the city by a third person, 4 Bull 1126 (but can not, as a bidder, enjoin the awarding of a public contract by the city, 3 Bull 709); may enjoin county commissioners from entering into any contract *ultra vires*, 1 D. 196, 200, and may compel, by mandamus, the proper authorities to furnish text-books to schools, 35 O. S. 368. A tax payer as such can not institute proceedings to have a street railway grant declared void because of the absence of the necessary consent of the abutting owners. Such an action can only be brought by an abutting owner, 30 Bull 213. See 3 C. C. 201; 5 Id. 124; 609; 30 Bull 24.

Trespass. Possession is essential to the maintenance of the action, 8 O. 40, 41. An administrator may maintain the action for trespass upon lands of the decedent before his death, 19 Cal. 117. An administrator of a mortgagee of lands, having obtained judgment and possession under foreclosure proceedings, may maintain trespass against the heir of the mortgagee, 11 Bush.

150. A corporation in possession of lands may maintain trespass against a stranger, 14 Pick. 301. An heir or devisee may maintain it for trespass committed on land after the death of decedent, 23 Mo. 99. A landlord can not maintain trespass while the tenant is in possession, 4 O. 333; 1 Clev. R. 369; but the tenant may sue the landlord for trespass, W. 647; 1 O. 251. A lessee of land in possession under a contract to give part of the crop for rent may maintain trespass upon land, 55 N. H. 543, and crop without joining the landlord, 5 Kas. 441.

Waste. At common law no one could maintain this action unless he had an estate of inheritance, 2 Saund. 252n 7. The heir could not sue for waste committed during the life of the ancestor, nor the grantee of the reversion for waste committed before the grant, *Id.* By statute, in some states, a remainderman and reversioner may maintain waste for injuries to their estates, N. Y. Code, Civ. Pro., § 1665; Bliss Code Pl. § 33, and an heir may bring an action for waste committed during the life of the ancestor, N. Y. Code, etc., § 1652. In this state one coparcener may sue another for waste, § 5774. A tenant in dower, § 4194; and tenant for life, § 4177; can not commit waste without forfeiting the part of their estates on which the waste was committed to those having the immediate estates in reversion or remainder, to whom they are liable in damages.

§ 4994. Plaintiff in action on bond. The rule prescribed in the preceding section may be so applied, when a person forfeits his bond, or renders his sureties liable, that any person injured thereby, or who is by law entitled to the benefit of the security, may bring an action thereon, in his own name, against the person and his sureties, to recover the amount to which he is entitled by reason of the delinquency, which action may be prosecuted on a certified copy of the bond; and the custodian of the bond shall deliver such copy to any person claiming to be so injured, on tender of the proper fee; but the provisions of this section as to the form of the action shall not be imperative, if provision is otherwise made by law; nor shall a judgment for one delinquency preclude the same or another party from an action on the same instrument for another delinquency. [51 v. 57; §§ 566, 567; S. & C. 1123, 1124.]

Suits on official bonds must be in the name of the state, 10 O. S. 515; 25 O. S. 567; 32 O. S. 421, unless the interests of private persons only are affected, 15 O. S. 473; 16 O. S. 522; 35 O. S. 206. In an action against the surviving obligors of an official bond the personal representatives of the principal are not necessary parties, 25 O. S. 620.

§ 4995. How executor, trustee, etc., may sue. An executor, administrator, or guardian, a trustee of an express trust, a person with whom or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is pro-

ecuted; and officers may sue and be sued in such name as is authorized by law. [51 v. 57, § 27; S. & C. 953.]

Executor, administrator. Where a contract is made with an executor or administrator personally after the death of the testator or intestate, or where money is received by the person sued after death, in such cases the executor or administrator may either sue in his own name, or as executor or administrator, 14 Mass. 327. An executor or administrator may sue in his own name on a judgment obtained by him, 6 Yerg. 417; on a note payable to him as representative, 6 N. Y. 168; or bearer, 112 Mass. 450, or to him individually for money due the estate, 50 Ala. 431; to recover back money of the estate paid by mistake, W. 174; 55 How. Pr. 434, or for the price of property sold by him as representative, 60 Ill. 30, or for the wrongful conversion of the property of the estate, 24 Cal. 167, though such conversion was made prior to his appointment, 11 How. 11; and no demand is necessary if the taking was tortious, 50 Cal. 367. Where a note is made payable to A, administrator of B, on A's death, his administrator, and not the administrator *de bonis non* of B, is the proper party to sue on it, 7 O. (Pt. 1) 268. Under the statutes an executor or administrator may petition to sell real estate of decedent to pay debts when there is insufficient personality, § 6137, and for that purpose may bring an action to get possession of land fraudulently conveyed by decedent, § 6140; may sue for injuries causing death, § 6134, 26 O. S. 522; may sue persons wasting the personal estate, §§ 6053, 6059; 42 O. S. 325; may foreclose a mortgage of decedent, §§ 6070, 6072; and may maintain an action in the court of common pleas against the creditors, legatees, etc., asking the direction or judgment of the court in any matter respecting the trust estate, etc., § 6202, 1 C. C. R. 320. A foreign executor or administrator may sue in the courts of this state, § 6133; and an administrator *de bonis non* may sue on the bond of a former administrator for the recovery of, § 6020, or injury to, § 6051, the assets and personal effects of decedent; see also § 5800. Administrator of assignee, 8 C. C. 178.

Trustee of an express trust. An express trust is defined to be a trust created by the direct and positive acts of the parties, by some writing, or deed, or will, 22 N. Y. 389; 28 Ind. 112. It often seems difficult to distinguish between such trustees and those with whom or in whose name contracts are made for the benefit of others, and many of the code states make the term "trustee of an express trust" cover this latter class of persons, Bias Code Pl. § 55. As illustrations of the former may be mentioned: An assignee for the benefit of creditors, 4 Abb. Pr. 106; an obligee of a statutory bond, 25 O. S. 567; 29 O. S. 452; one holding possession of money upon trust for the benefit of others, 1 C. C. R. 57; 13 Bull 294; assignees of a contract in trust to reimburse out of the proceeds thereof third persons for advances made, 4 Keyes 514; a mortgagee trustee for holders of promissory notes secured by mortgage, 29 O. S. 330; trustees appointed to take and collect subscriptions for colleges and other similar purposes, 34 How. Pr. 320; insurance brokers holding an open policy of insurance for "those and whom it may concern," 6 O. S. 554; one to whom the legal title in a note and mortgage has been transferred for the purpose of collection, 3 Bull 365; 7 Rec. 9; an assignee of stock subscriptions, 12 Wis. 668; see 41 O. S. 321. A part owner of a vessel in whose name a policy of insurance on the whole vessel, for account of the owners is issued, becomes a trustee for

all the owners; and, in case of loss, may sue on the policy in his own name alone, 26 O. S. 664. In an ordinary deed of trust, to secure a debt with power of sale, the trustee upon sale under the power, is the proper party plaintiff to recover the purchase money, 31 Mo. 535. A mortgagee of lands in trust for the use and benefit of another is the proper party to sue for possession or damages by trespass or other injury, 24 Wis. 422; a sheriff is the proper party to sue a purchaser for the price of property sold on execution, 25 O. S. 529. Where money, the separate property of the wife, was loaned to parties who knowing it to be hers, gave back notes to secure its payment to the husband in his own name, the husband does not become by such transaction the trustee of an express trust who must sue in his own name, 1 H. 537, 539. Under § 6341, providing that the successor, of a trustee or assignee failing to deliver over to the successor trust property, may proceed against such trustee or assignee by action in the "common pleas or otherwise," the successor may bring his action in the superior court, 1 C. C. R. 20.

One with whom a contract is made for the benefit of another. An agent may sue on a contract made by him in his own name, 38 O. S. 397; 13 Bull 294; 1 C. C. R. 57; though the name of the principal is disclosed, 22 N. Y. 339; 38 O. S. 397; and where a contract is made between two persons for the benefit of a third, such third person may sue upon it in his own name, 4 O. S. 333; though the instrument be under seal and the beneficiary not named therein, 42 O. S. 82, the beneficiary may sue in his own name or in the name of the contracting party, 15 O. S. 151. An auctioneer may sue for the price of goods sold by him whether he have an interest in the price or not, 7 N. Y. 220, 224; 1 E. D. Smith, 590; the master of a vessel for freight, 17 Abb. Pr. 73; or for conversion of cargo, 13 Minn. 85; a factor who transacts business in his own name, 2 Sanf. 706; a contractor for the benefit of third parties, 1 Bosw. 43; a sheriff for the price of property sold on execution, 11 Minn. 220; a payee of a note for the benefit of others, 12 Kas. 85; a sheriff on a replevin bond, 2 D. 592; 41 O. S. 591; and where a grantee in a deed of land was acting as agent for another and the purchase price was paid with that other's money, the grantee was held the proper party to sue for a breach of a covenant broken immediately upon the execution of the deed, 14 O. S. 417, 423.

Officers. *Attorney-general* appears for the state in the trial of all causes, civil and criminal, § 202; brings suits on official bonds of delinquent officers and against officers for offenses against the revenue laws of the state, § 203; prosecutes proceedings in *quo warranto*, § 204, when directed by the supreme court, governor, or general assembly, § 6762; proceeds by civil action in the name of the state against delinquent officers of colleges, etc., § 3771. *Corporation counsel* prosecutes suits for and on behalf of the city, § 1774; may enjoin in the name of the city the misapplication of corporate funds, § 1777; or in the name of a taxpayer, with his consent, 29 O. S. 291. *County commissioners* must sue to recover property belonging to or money due the county, § 845; in their name, 15 O. S. 15; may sue in the name of the board when the cause of action arises out of the subject matter within their control, unless by statute the suit is required to be brought in some other mode, 35 O. S. 201, 207; they must sue for injuries to state or county roads and bridges and public buildings of the county to reimburse the county for repairing them, § 863; 43 O. S. 451; may bring actions to establish county boundaries, § 808; they can not bring suit in their

name upon a county treasurer's bond, 10 O. S. 515; and can not sue on a contract they are unauthorized to make, 18 O. S. 49; 21 O. S. 648; they are not liable in their official capacity to an action for damages for injury resulting to a private party by their negligence in the discharge of their official functions, 7 O. S. 109, overruling; 2 O. 348; see 23 O. S. 600; nor are they personally responsible in damages where they act in their official capacity in good faith and in the honest discharge of official duty, 40 O. S. 516. *County solicitor* prosecutes and defends all suits which the boards of county commissioners and control may direct, or to which they may be parties, § 1001; 81 v. 194. *County treasurer* could not sue for taxes in his own name, 2 C. S. C. R. 336; but under § 1104, 83 v. 156, he may enforce a lien on premises for unpaid taxes by civil action in his own name as treasurer; and, under § 2859, to compel the payment of taxes it is not necessary that his individual name should appear or be inserted as plaintiff, 81 O. S. 317. *Prosecuting attorney* of the county, in addition to the prosecution of criminals, brings actions on forfeited recognizances, § 7183, in the name of the state without joining the name of the county for whose benefit the suit is prosecuted, 21 O. S. 183 (35 v. 87); sues on bond of delinquent county treasurer, § 1133; attends to suits on behalf of asylums for the insane, § 718; may enjoin in the name of the state the misapplication of county funds or the execution of unlawful or fraudulent contracts, § 1277; brings actions against railroad and telegraph companies to recover penalties, § 263; and against state land agent, § 8463; may commence proceedings *in quo warranto* when directed by the governor, supreme court, or legislature, § 6762. *Sheriff* alone must sue for conversion of attached property, 17 O. S. 183, 189; and for the price of property sold at judicial sale, 29 O. S. 529; except after confirmation and assignment of his right of action to the creditor, 15 O. S. 548; he only can sue on a replevin bond, 41 O. S. 591; 2 D. 592; 4 W. L. G. 273; unless there has been an assignment of the bond, or of the judgment in replevin, or refusal or neglect of the sheriff to enforce it, 41 O. S. 591. To recover an excess over the balance due on a judgment, received by the judgment creditor, the owner of the land encumbered by the judgment lien may maintain the action, though the judgment creditor was the purchaser and the owner not a party to the judgment, 40 O. S. 253. *Township trustees* must sue in the corporate name, 8 O. 175; may sue to recover penalty for obstructing public road, § 4748; 40 O. S. 521. Township clerk can not sue for money received by township treasurer and converted to his own use, 21 O. S. 643.

§ 4996. How married woman may sue and be sued.

A married woman shall sue and be sued as if she were unmarried, and her husband shall be joined with her only when the cause of action is in favor of or against both her and her husband. [81 v. 65; 76 v. 3, § 28.]

Synopsis of legislation; see 19 Bull 319.

A married woman may now bind herself, to the same extent and in the same manner, by contract as though she were unmarried, 13 Bull 15; 12 Bull 229; 14 Bull 1; *Id.* 197; *Id.* 399; 50 O. S. 417; see 9 Bull 333; 12 Bull 229; and she can be compelled to execute a contract in writing made jointly with her husband to convey her separate estate, though the contract is not in the form of a deed and there is no acknowledgment by her separate

and apart from her husband, 1 C. C. R. 408; but the laws of 1887, 84 v. 132, dispense with separate acknowledgments of deeds, etc., by married women; provide that married persons may take, hold and dispose of property, real or personal, the same as if unmarried; may, in the same manner, contract with each other, and neither husband nor wife is answerable for the acts of the other, see § 5319. Her liabilities were not prior to the legislation of 1884 enlarged by these sections, 44 O. S. 192.

Plaintiff. Before these amendments a married woman could, and of course can now, sue alone to recover a debt due her, 31 O. S. 579; for the seduction of her husband, 84 O. S. 621; for assault and battery, 37 O. S. 10; for an injury to property decreed her as alimony, 1 O. S. 403, and bring ejectment for it, W. 205; after seven years abandonment, 33 O. S. 155; when abandoned by husband in foreign country when she came here, 5 O. S. 580, and when abandoned under §§ 3111, 3113, and for slander, 4 Bull 31; contra, Id. 596. She does not now prosecute by next friend, 4 Bull 596. It has been held that she may sue her husband to recover land, her separate property, 1 Lans. 421; and her personal property, or the value of services rendered in his business or under such circumstances that a promise to pay would be implied, 1 Lans. 164; and when the husband and wife were owners in common of land she might maintain a suit against him for partition, 47 N. Y. 467, but could not recover damages against him for assault and battery, 44 Barb. 366, or slander, 42 Barb. 641; and the husband could not recover against his wife for services rendered to her in the management of her separate estate, there having been no express agreement for payment, 62 Barb. 531. Can not sue for loss of husband's wages, etc., 17 Bull 370. Can sue husband in her own name, 1 N. P. 382.

Joinder as plaintiffs. It has been held that the husband must join with the wife in an action for malpractice of physician in attending the wife, W. 466; for loss of wife's baggage, 1 W. L. M. 451; for slander, 4 Bull 596; contra, Id. 31; may join in an action to recover a debt due the wife, 31 O. S. 579, and that where lands were conveyed to her prior to the act of 1861, she could not alone maintain an action to recover them from a stranger, 20 O. S. 128; but where the husband was induced by false representations to purchase land, and the title was taken in his wife's name, but the consideration wholly paid by him, she could not be joined in an action for deceit, 13 O. S. 72; that the petition alleging a joint cause of action in favor of husband and wife and showing a cause of action in favor of the husband only was demurrable, Id. Tenants in common, 42 O. S. 190.

Defendant. Where the action concerned her separate property, was upon her written obligation, concerned business in which she was a partner, brought to set aside a deed or will, to collect a legacy, or was between her and her husband, her husband was not required to join as plaintiff or be joined as defendant, 76 v. 3, § 28; but in an action on her promissory note it was held that coverture should be averred, 1 Bull 73, and that she had separate property subject to be charged, 26 O. S. 27, though it was not necessary to describe it, 2 Bull 122; 5 Bull 817; nor to allege that she intended to charge it by executing the note, for that was presumed, 35 O. S. 296; Id. 270. It is not now necessary, under the present statutes or those of 1886, to aver or prove that she is a married woman, or the owner of a separate estate, or that she contracted the debt or obligation with reference to her separate estate, or for its benefit, 84 v. 132; see 14 Bull 399; 16 Bull, 291; 61 N. Y. 249; 65 How. Pr. 264. The remedy against the separate

estate of a married woman is the same as if she were unmarried. A married woman having entered into a contract after the act of March 20, 1884 to become surety for her husband, no specific lien having been created by the contract, the remedy is not by suit in equity to charge her separate estate, but by action at law against her as an unmarried woman, 30 Bull 25; 50 O. S....

Joinder as defendants. The code, it is held, does not change the common law liability of the husband for the torts of the wife, 8 O. S. 594; 49 N. Y. 193; Bliss Code Pl. § 85. In actions for damages arising from the wrongful act of a married woman, husband and wife, it is held, must be joined as defendants, 32 O. S. 299, and if, in the commission of a tort, she acted under marital coercion, and such fact does not appear on the face of the petition, her defense in that respect must be made by answer, *Id.* Under the recent amendment, § 3115, 84 v. 133, neither husband nor wife is answerable for the acts of the other, and it would appear that a joinder of the husband would not now be required for the wife's tort. At any rate, even before the amendments of 1887, where the tort was in respect to her separate property, the action should be against her individually, without joining her husband, Bliss Code Pl. § 86; as in an action for alleged conversion of chattels by the wife under color of a claim of ownership, 1 Lans. 295; for damages caused by the falling of a chimney of a house owned by her, 2 Daly 140; and when the wife, being the owner of a farm upon which she, with her husband and family, lived, with cattle and horses that were used in connection with the land, for the support of her family, an action was sustained against her alone for damages caused by the cattle and horses in straying upon the plaintiff's ground, 45 N. Y. 230; and where the husband, an agent of the wife, made fraudulent representations in the sale of her land, it was held that the tort was hers; that it had relation to her separate property, and that she should be sued alone, 47 N. Y. 577.

By the laws of 84 v. 132 the following amendments, relating to the rights of husband and wife, were passed:

§ 3108. Husband and wife contract towards each other obligations of mutual respect, fidelity, and support.

§ 3109. The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

§ 3110. The husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him so far as she is able.

§ 3111. Neither husband nor wife has any interest in the property of the other, except as mentioned in §§ 3110 and 4188, but neither can be excluded from the other's dwelling.

§ 3112. A husband or wife may enter into any engagement or transaction with the other, or with any other person, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other.

§ 3113. A husband and wife can not, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation, and may make provision for the support of either of them and their children during the separation.

§ 3114. A married person may take, hold, and dispose of property, real or personal, the same as if unmarried. [See §§ 4107, 4188.]

§ 3115. Neither husband nor wife, as such, is answerable for the acts of the other.

§ 3116. If the husband neglects to make adequate provision for the support of his wife, any other person may, in good faith, supply her with necessities for her support, and recover the reasonable value thereof from the husband.

§ 3117. If the wife abandons the husband, he is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him.

§ 4997. When wife may defend. When husband and wife are sued together, the wife may defend for her own right; and, if the husband neglect to defend, she may also defend for his right. [51 v. 57, § 29; S. & C. 954.]

The section is not applicable to actions against husband and wife in which the trial and judgment must be joint, 8 O. S. 594. A married woman, sued with her husband, may defend separately by attorney, 1 H. 20; and where husband and wife were sued for alleged trespasses of the wife on property in which she claimed an easement as appurtenant to a lot owned by her, in default for answer by the husband, the wife, it was held, might make a separate defense, and, if her defense was good, it was complete as to both, 42 O. S. 329.

§ 4998. Action of insane person and infant by guardian, etc. The action of an insane person must be brought by his guardian; the action of an infant must be brought by his guardian or next friend; and, when the action is brought by his next friend, the court may dismiss it, if it is not for the benefit of the infant, or substitute the guardian, or any person, as the next friend.

Action to recover property belonging to imbecile must be brought by guardian and not by next friend, 33 Bull 343.

The guardian of an insane person must sue in his own name, 1 W. L. J. 454; see Id. 96; notice to the insane person of his appointment is not required, 10 Bull 321; but is to next of kin, § 5302. The affidavit verifying a pleading may be made by an agent or attorney when plaintiff is an infant or insane, § 5109. Minority should be distinctly averred, and will not be presumed, 5 O. 227. The disability of infancy of a female is removed at the age of eighteen, 3 O. S. 80. Foreign guardian inelligible, 19 Bull 106; next friend in individual capacity defendant, 2 C. C. 77.

§ 4999. Next friend liable for costs. The next friend shall be liable for the costs of the action brought by him, and, when a next friend is insolvent, the court may, on motion, require security therefor. [51 v. 57, § 31; S. & C. 954.]

The infant is not liable to judgment for costs, 8 Neb. 336. The guardian for an infant plaintiff is responsible for costs, under the New York Code, Civil Pro., § 469; 29 How. 344; 10 Abb. 41; but not the guardian of an infant defendant unless specially charged therewith by order of court for personal misconduct, Id. § 477.

§ 5000. Defense of insane person. The defense of an insane person must be by his legally appointed guard-

ian, or, if there is no guardian, or the guardian has an adverse interest, by a trustee for the suit, appointed by the court; and if the insanity of a party be discovered, or he become insane after the action is brought, it shall be thereafter prosecuted or defended by his guardian, or his trustee appointed as provided in this section. [51 v. 473, § 7; S. & C. 384.]

The defense of an insane person must be by his guardian, 15 Neb. 296, and before the statute it was the duty of the court to appoint a guardian *ad litem* for an insane person, 1 O. S. 554, and no decree could be taken against him without an answer by such guardian, *Id.*; but a judgment rendered against an insane person, without the intervention of a guardian or trustee, and in favor of one having knowledge of the insanity, is not void, 31 O. S. 247; see 11 Bull 10.

§ 5001. Duties and compensation of guardian *ad litem*. The court shall require a guardian *ad litem*, or a trustee appointed under the preceding section, faithfully to discharge his duty, and, upon his failure so to do, may remove him, and appoint another in his stead; and the court may fix a compensation for his services, which shall be taxed in the costs against the minor or insane person. [51 v. 473, § 8; S. & C. 384.]

§ 5002. How insanity of party determined. When the insanity of a party is not manifest to the court, and the fact of insanity is disputed by a party or an attorney in the action, the court may try the question, or impanel a jury to try the same. [51 v. 473, § 7; S. & C. 384.]

Whether accused insane see § 7240.

§ 5003. Defense of infant by guardian *ad litem*. The defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or by a probate judge. [51 v. 57, § 32; S. & C. 954.]

By magistrates, § 6474.

It is error to render a decree against infant defendants until the appointment and acceptance of a guardian, 3 O. 355; but a judgment can not be collaterally impeached because minor defendants brought in by publication of notice had no guardian *ad litem* appointed for them, 13 O. 535. Process must be properly served before it is competent for the court to appoint a guardian *ad litem*, 1 H. 287; see § 5047. When appointed it is the duty of the guardian to make a proper defense, 17 O. S. 484; see § 5078. Under the act of 1858 a guardian could appear and defend for his ward as effectually as though he were appointed guardian *ad litem*, 21 O. S. 651. A decree against minor defendants, rendered upon the answer of their guardian *ad litem*, may be impeached or reversed for fraud, 12 O. 351.

§ 5004. Appointment of guardian ad litem. The appointment may be made upon the application of the infant, if, being of the age of fourteen years, he apply within twenty days after the return of the summons, or service by publication; and in case of his being under said age, or of his neglect so to apply, the appointment may be made on the application of the plaintiff, or a friend of the infant; but the appointment can not be made until after service of summons, or publication. [51 v. 57, §§ 32, 33; S. & C. 954, 955.]

Appointment of guardian *ad litem* for minor defendants who have not been served with process does not effect an appearance for them nor give the court jurisdiction over them, 1 O. S. 369. But service will be presumed where the record is silent as to that fact, 15 O. 689.

§ 5005. Joinder of plaintiffs. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided. [51 v. 57, § 34; S. & C. 955.]

Account and accounting. In an action for obtaining an accounting all persons interested should be made parties, 1 Barb. Ch. 97; 7 Lans 95; 81 N. C. 28. In a suit by one of several wards for an account against his guardian, the sureties upon his official bond, and the other wards interested in the general fund, must be parties, 8 Fla. 77; in a suit in equity, by a portion of the members of a firm against a co-partner for an accounting of the fund, all the partners must be parties, 38 Ill. 27; in a suit by an administrator of a deceased partner, to have an account of the partnership affairs, the heir is not a necessary party, 17 Wall. 417. All the creditors secured by a deed of trust must be made parties to a suit by one of the same class for an account of the trust fund, 5 Jones Eq. 14. The assignor of an account as collateral security should, if made a party at all, be made a party plaintiff in an action against a debtor by the assignee on the account, 11 O. S. 374, 377.

Assessment. Several owners may join in an action to restrain the collection of an illegal assessment or tax, 38 O. S. 314; 23 O. S. 605; 24 O. S. 232.

Assignment for creditors. Several beneficiaries, under a conveyance for the benefit of creditors of a mortgagor, may unite in an answer setting up usury as a defense in a suit to foreclose by the mortgagee, 14 O. S. 200, 211.

Attorney. In an action for damages against a railroad for negligence, an attorney who has received a certain amount of the sum recovered as compensation is not a necessary party plaintiff, 26 Ia. 141.

Bills and notes. Joint owners must join as plaintiffs. When a note is executed to joint payees, upon the death of one, the right of action vests in the survivor, and upon his death in his administrator, 3 Head. 316. The representative of a joint payee and the survivor can not join in an action on such note, 40 Ill. 114; Bliss Code Pl. § 62; but in an action on a joint note payable to several, if one becomes bankrupt, his assignee must be joined as plaintiff, 3 O. S. 284.

Bond. In an action for relief against a judgment on a bond all the obligors should be parties plaintiff, 8 O. 43. In an action on an assignee's or trustee's bond, under § 6341, a joint suit against all the obligors is the only remedy, 1 C. C. R. 20, 21. Attaching creditors may join as plaintiffs in an action upon an attachment bond, though not named as payees therein, 10 O. S. 478; and the action may be prosecuted by those obligees who have an interest in the damages sought to be recovered without making the other obligees, who have no interest in the action, parties, 23 O. S. 358.

Community of interest. Persons having separate and independent claims can not be compelled to prosecute them in a single action, 16 O. 373; see 10 O. 456; 17 O. S. 323.

Coparceners must join in an action on warranty, 10 O. 442.

Executors and administrators. All the acting executors or administrators must join, Pomeroy Rem. § 261; but if a portion only have proved, the others need not be made parties, though they may not have formally renounced, *Id.* It is not indispensable though that all the executors or administrators should be plaintiffs, it is enough if all are before the court so that one executor or administrator may sue as plaintiff if he makes his co-executor or administrator defendant, 1 Green Ch. 288. In an action by an executor to sell land in order to pay the debts of deceased, the widow and heirs, devisees, or persons having the next estate of inheritance, mortgagees and other lienholders and trustees holding the legal title, are necessary parties, § 6142; and in an action to set aside a fraudulent conveyance all persons holding or claiming thereunder, *Id.* A mortgagee prior to 1858 was not a necessary party to an action by an administrator to sell lands to pay debts, 11 O. S. 486. Since then the lien of a mortgagee not made a party to the proceedings remains unaffected, 19 O. S. 472; but when an administrator files a petition to sell to pay debts, land of decedent or land conveyed by him in fraud of creditors, he can not join as co-plaintiff one of the creditors, 2 Clev. Rep. 137.

Guardian and ward. When one is the several guardian of each of three wards, and not the joint guardian of all, a suit for their joint benefit can not be sustained on his bond, but an amendment will be allowed by striking out two of the names, 10 W. L. J. 163.

Heirs may maintain trespass without joining the widow where the will leaves real estate to the widow and heirs in certain proportions, 2 Clev. Rep. 81. The heirs and administrator of an illegitimate child may jointly maintain an action to enforce a contract between his father and mother by which his father was to leave him a share of his estate, 7 Bull 183. Heirs can not sue an executor or administrator under §§ 6053-6059 for wasting the estate, 42 O. S. 325; and can not bring an action to recover assets belonging to the estate where there are no outstanding debts, or compel an accounting by executors of deceased who had a life estate in, and wrongfully disposed of, such assets by will, 25 O. S. 668.

Injunction. Several persons may unite in an action to restrain a public nuisance, 1 D. 401, when specially injured, 1 H. 52; 4 Bull 156; but they must show that they have been specially injured, 23 O. S. 523; 2 D. 516; 4 O. 376. Several owners of separate lots may unite to enjoin the collection of an illegal assessment or tax, 38 O. S. 314; 23 O. S. 603; 24 O. S. 232; contra, 10 O. 235. Nuisance, 7 C. C. 470.

Injuries to person. For injuries to the person each one generally should sue alone, 1 Chitty Pl. 64; Bliss Code Pl. § 26; as in slander and libel, 8 E. D. Smith 337; 38 Ia. 355; 36 Ia. 563; malicious prosecution, 14 Ia. 575; deceit, 46 Ia. 323; but the wrongful act may injure two or more persons in their joint relation, when a joint action will lie; as in an action for libel and slander against a partnership, the partners may join, 11 Moore 360; 2 East. 426; 3 Bos. & Pul. 150; and where false and fraudulent representations concerning the solvency of a person were made to a partnership, by which they were induced to sell him goods and sustained loss thereby, a joint action, it was held, might be brought by all the partners, 13 N. Y. 322; and two persons were permitted to sue jointly for malicious prosecution when the special damage laid was that they jointly incurred expense in procuring their liberation, 10 Moore 446; and it was held not a misjoinder for husband and wife to join in an action for slander of the wife, because her reputation was his property as well as hers, 4 Bull 596; 2 Clev. Rep. 260; contra, 4 Bull 31.

Joint creditors can not, by a division of their claims among themselves, acquire separate rights of action against their debtor. If the debtor, however, procures a release of part of them, he can not object to the others proceeding against him in equity, 2 O. S. 13.

Joint owners of chattels must join in an action for conversion, 44 Barb. 428; in actions on contracts relating to them, 32 N. Y. 685; and for the recovery of possession, 13 N. Y. 173. One joint owner can not maintain replevin against his co-owner in the exclusive possession, 53 Mo. 397; 50 Cal. 474.

Joint tenancy never existed in Ohio, 10 O. 1.

Legatees and distributees. A legatee and purchaser of plaintiff *pendente lite* can not join in a bill of revivor, their interests being adverse, W. 600. Distributees, it is held, can not join in an action against an administrator to recover their shares, 2 O. 156; see § 6215.

Mechanics' liens. Owners of three separate mechanics' liens on one building can not join as plaintiffs, 1 Kas. 293; but it has been held that material men and mechanics who are entitled to a lien on a building, and whose claims are several, without any community of interest in the claims themselves, may join in an equitable action to enforce their liens, 33 Cal. 502.

Mortgage. Foreclosure. All persons who are entitled to share in the proceeds, whether they are interested jointly, or in common, or severally, must be made co-plaintiffs, or at least brought into the action as defendants, Story Eq. Pl. § 201. The owner of the mortgage may foreclose it, though he has pledged the same as collateral security, 64 N. Y. 657. After his death the administrator, and not the heir, is the proper party to foreclose it, §§ 6070, 6072; 34 N. J. Eq. 33n; 17 O. 264 (administrator *de bonis non*). The assignee of a mortgage may foreclose it, 7 Johns. Ch. 144; and though the form of the assignment should be in writing, a parol assignment is sufficient, 29 Mich. 9; 80 N. J. Eq. 244; but in such case the assignor should be made a party, 68 Ala. 147. In Maine and Massachusetts a parol assignee can not foreclose in his own name, 12 Gray 53; 23 Me. 845. The assignee of a mortgage as collateral security may foreclose it, 7 Johns. Ch. 144; and the assignee of a mortgage note, though the mortgage is not assigned, 16 Wall. 271; Jones Mortg. § 1377; but not the assignee of a mortgage without the note, 17 Abb. Pr. 342; 47 Barb. 253. He may join the assignor with him, 23 Ind. 118, or make him defendant, 46 Me. 445; and where it is the law that

the transfer of the note carries with it the security, 4 O. 312, the assignee may foreclose without making the mortgagee a party, 85 Mich. 474. An assignee in bankruptcy, *Willis*, Parties in Foreclosure, § 22, or his assignee, 12 N. J. Eq. 643, a receiver of an insolvent corporation, 36 Ill. 133, or his successor, may foreclose a mortgage, *Id.* An executor or administrator may foreclose a mortgage executed to him as such, 39 Ga. 26; and after his death his personal representatives are necessary parties, 10 N. Y. 509; 4 Abb. 280 (but a foreign executor or administrator can not foreclose unless he has received his appointment from the court of the state in which the property is situated, 30 N. J. Eq. 106; 34 Id. 83 and note); and a person to whom a mortgage is executed in an official capacity, or his successor, 36 Ill. 133. When a *cestui que trust* brings a bill to foreclose, the trustee is a necessary party, Story Eq. Pl. §§ 201, 209; 6 Mich. 70; 16 N. J. Eq. 28; but a trustee to whom a mortgage is executed to secure funds of the trust estate may foreclose in his own name as such trustee, 36 N. J. Eq. 548. As trustee of an express trust a mortgagee may foreclose in his own name, though he owns no part of the mortgage debt in his own right, 29 O. S. 330; see W. 431; and the holder of bonds secured by a mortgage may foreclose on behalf of himself and other bondholders, 10 Abb. Pr. 296; see 35 O. S. 307, 315; and the bondholders are neither necessary nor proper parties, 10 O. S. 372; and in a suit by a trustee to foreclose a mortgage, it has been held not necessary to make the *cestuis que trustent* parties, though the trustee be insolvent, 2 D. 415. So when a mortgage has been assigned to a trustee, in trust for the benefit of creditors, the trustees are the only necessary parties plaintiff in foreclosure, 25 Beav. 253; and the creditors need not be joined, *Id.*; 1 Barb. Ch. 254. Judgment creditors, however, as beneficiaries, have been allowed to come in and set up usury against the petition where the assignee fails or refuses to answer for them, 14 O. S. 200. Joint mortgagees may unite in foreclosure, Pomeroy Rem. § 255; and persons having a united interest in the debt secured, even if their interests be several, Jones Mortg. § 1368; and where one of two joint mortgagees has become the owner of the equity of redemption the other may maintain a bill for foreclosure against him to the extent of his interest, 30 Conn. 344. On the death of one of a number of joint owners of a mortgage, the surviving owners can foreclose without bringing in the personal representatives or heirs of the deceased joint mortgagee, 8 Gray 154; 30 Md. 536; contra, 16 N. J. Eq. 28; 32 Id. 678, 683. A partner holding a mortgage as security for a debt due the partnership should join the other partners with him as plaintiffs in an action to foreclose, 30 N. J. Eq. 435, though it is executed to one member, *Id.*; 3 Vt. 160; unless, perhaps, it is held by one as trustee, 44 Mich. 634; and if any refuse to join as co-plaintiffs they may be brought in as defendants, the fact being stated in the pleadings, 36 N. J. Eq. 403. In case of the death of a partner pending foreclosure the survivors take the legal title, and the representatives of deceased are not necessary parties, 78 Ill. 120. A surety of a debt secured by a mortgage on lands of the principal, on paying the debt, is subrogated in equity to the rights of the mortgagee, and may foreclose in his own name without an assignment of the mortgage and bond, 42 N. Y. 89; 2 Greenl. (Me.) 341. The husband of a wife owning a mortgage as separate property is not a necessary or proper party in an action to foreclose it, 34 Vt. 256; but objection to the joinder of the husband should be taken by demurrer, and can not be insisted on at the hearing, *Id.*; and where a bond and mortgage were made to the husband and wife,

the wife was held entitled to foreclose in her own name on the death of the husband, on the ground of survivorship in joint tenancy and because the money was loaned by the wife, 20 Ind. 108. The holder of one of several notes may foreclose a mortgage securing them, but he must make the other mortgagees or holders of notes defendants, 45 Ind. 355; 33 Ill. 284. Holders of notes can not join as plaintiffs; only one such holder can be plaintiff, and he must make the other holders defendants, as there is no community of interest between them, Jones Mortg. § 1378; 14 Kas. 387; but where one holds two or more notes he may foreclose them in the same action, 33 Ill. 284; and the holder of two mortgages upon the same premises may foreclose them in one suit, although they were given by different persons, if made to secure the same debt, 7 Ala. 823; he is not allowed to bring separate foreclosure suits, 10 Paige 415. The holder of a note secured by a mortgage transferred after maturity without indorsement by a person not having title, it has been held, can not, as against the real owner, have a right to foreclose the mortgage, 43 O. S. 284. If the mortgagee has absolutely assigned the mortgage and retains no further interest in it, he is not a proper party, 20 O. 474; but if he has assigned it as collateral security, 7 Johns. Ch. 144, if the assignment is not absolute, and the mortgagee retains an interest in the security, 10 N. J. Eq. 320, he is a necessary party to the foreclosure; and though the assignment is in terms absolute, and expresses the payment of a full consideration, the mortgagee should still be made a party if the assignee is accountable to him for any part of the proceeds of it, 1 Sandf. Ch. 76.

Redemption. The mortgagor and all others having a right to redeem should be made parties plaintiff or defendant, Pomeroy Rem. § 256. The heir or devisee of a deceased mortgagor is a proper party plaintiff, 47 Barb. 144. If the mortgagor has conveyed his interest absolutely, 46 Me. 297, or assigned in bankruptcy, L. R. 10 Eq. 398, or his right has been sold on execution, 1 Dev. & B. (N. C.) Eq. 613, he need not be made a party to redeem; but if he has conveyed the equity of redemption by warranty deed, so that he is liable to discharge the mortgage, the mortgagor should be made a party, Story Eq. Pl. § 183. If the mortgage is a leasehold estate, the personal representatives of the deceased mortgagor are proper parties, Story Eq. Pl. § 170; and if part of a mortgage in fee has been paid in the life-time of the mortgagor, and an account is to be taken of the amount due on the mortgage, the personal representatives should be joined with the heir or devisee as parties plaintiff; or, in case of their refusal to join as plaintiffs, they should be made defendants, Jones Mortg. § 1098. The wife, in a bill to redeem her own lands, need not join her husband, 46 Me. 297. When two tracts of land are mortgaged to the same person to secure the same debt, and they afterwards come into the hands of different proprietors, one of them, it has been held, can not be redeemed without the other. The owners of both parcels, and all persons interested, must be made parties to the action; and if not all as plaintiffs, then at least as defendants, 36 Me. 50; but if the mortgage comes into the hands of different persons, all connection between them is severed, and the actions to redeem must be separate, 2 Eden 78.

Nuisance. Several parties may unite in an action to restrain a public nuisance when specially injured, 1 H. 52; 1 D. 401; 23 O. S. 523; 4 O. 376; 2 D. 516; 4 Bull 156; but not for damages, as there is no community of interest as to damages, Bliss Code Pl. § 76.

Replevin. Mortgagor and mortgagee of chattels can not join, 6 Bull 247; and owners of separate mortgages upon the same chattels can not properly join, but when so joined the court may render judgment against all, 15 Bull 125.

Specific performance. Only parties to the contract need be made parties, ordinarily, in a suit for specific performance, 109 Ill. 71. If the vendee dies, his heirs are the parties to bring the action; his administrator, when the action is to recover damages, 19 Wis. 438; 35 Ia. 512, 518. If the vendor dies, his administrator must bring the action for the price, not the heirs, 63 N. Y. 301; but Mr. Bliss says even if the vendor has died without having acquired the legal title, this will not excuse the administrator from uniting his heirs as parties, Bliss Code Pl. § 108; 1 Hare 547. A stranger claiming an interest under an adverse title is neither a necessary nor proper party, Pomeroy Rem. § 263; 3 My. & Cr. 63, 69; and a mere agent for the purchase and sale, although he transacts business in his own name, is not, ordinarily, a proper party to the suit, unless his relation to the transaction is such as to make him a trustee, 21 W. Va. 656; but a person claiming under a prior agreement is a proper party, Pomeroy Rem. § 263; 1 H. & M. 176; and one having acquired an interest in the subject matter after the making of the contract under the vendor and with notice of the vendee's rights, 13 Sim. 206. Purchasers of separate tracts can not unite in an action against the vendor, but if there is one contract of sale to several persons covering the land, although it may have stipulated for different shares, the purchasers may unite, 24 Cal. 171, 177; see §§ 5797-5802.

Street railroad. Property owners can only attack the validity of the grant of a street railroad, so far as it affects the street upon which their property abuts. In such an attack property owners on one street do not belong to the same class as those on another street, and therefore they can not unite in the same action, 30 Bull 213.

Sureties. Where several sureties pay the debt of their principal, and there is no evidence of a partnership or joint interest, or of payment from a joint fund, the presumption is that each paid his proportion, and a several action will lie for its recovery from the principal, 14 Me. 223; 20 N. H. 418; but if several sureties pay the debt of their principal from joint funds, they may join in an action for reimbursement, 18 Hun 141; 14 Pick. 287; and, it is held, if the judgment is joint against the sureties, all must join in an action against the principal, 2 O. 209 (1825). Where sureties pay the whole debt jointly they may join in an action against those who did not pay, for contribution, 23 Vt. 593; and if one of the paying sureties has died, his executor may be joined as one of the plaintiffs, 50 Cal. 456.

Tax-payers. Several owners of separate lots may unite to enjoin the collection of an illegal assessment or tax, 38 O. S. 314; 23 O. S. 605; 24 O. S. 232; or one may sue on behalf of all similarly situated, 5 O. S. 364; 38 O. S. 314; but not when the persons for whom suit is brought are divisible into classes whose rights and liabilities are not necessarily the same, 29 O. S. 500, 508. It has been held that several persons can not so unite, though similarly situated, 10 O. 235; 5 Blatchf. 259. In Kansas a distinction is drawn as to the right of action when the tax is wholly illegal, when any number can unite to enjoin its collection, 10 Kas. 326, 491, 509; and where it is valid and becomes illegal only in its application, when each person severally interested must sue alone, 12 Kas. 140, 146, 147; see 29 Kas. 364. In Iowa it is held that they can not unite to restrain the collection of an

illegal tax, nor can one sue on behalf of others similarly situated, but each must sue alone, 36 Ia. 413, 416-420; and in Wisconsin it has been held that they can, 21 Wis. 516, and can not join in such action, 18 Wis. 566; 19 Wis. 93. See St. R. R. *supra*.

Tenants in common may join in an action for rent where they unite in renting the property, 42 O. S. 190; and where they are married women owning their shares as separate property their husbands need not be joined, Id.; must join in personal actions for injuries to the estate, 37 N. Y. 372; but if the share of one tenant in common is separable from that of the others, he may sue for the conversion of his share, 77 N. Y. 158. It is held that they are not required to join in an action for possession, 16 S. C. 220; nor in an action to set aside deeds severally made by them, 28 Kas. 174. Under the New York statute they may sue jointly or separately in ejectment, 41 N. Y. 219, where such an action might be maintained by all, Code Civ. Pro. § 1500. Ejectment lies by one excluded from possession by the other, 2 O. 110; 19 O. 218; or against a stranger, W. 330. Mortgagors, tenants in common, can not sue the Mortgagee separately for their share of the proceeds at a foreclosure sale after satisfaction of the debt, S. C. R. I. 8 Atl. Rep. 697.

Trespass. Tenants in common should join in trespass, 13 Johns. 287; one may sue alone as against a stranger, 42 Vt. 679. Trustees may maintain trespass when the legal title is in them, 26 Me. 512. Where a will leaves real estate to a widow and heirs in certain proportions, the heirs may maintain the action without joining the widow, 2 Clev. Rep. 81.

Trust. Generally, in actions by trustees, the beneficiaries must join as plaintiffs or defendants, Pomeroy Rem. § 260; see 5 Rec. 285; 1 Bull 300; but in actions by trustees of an express trust, § 4995, and in suits between the trustees themselves, brought by one to compel the other to account and restore the trust property misappropriated by him, the beneficiaries need not be made parties, Story Eq. Pl. § 213. If the *cestuis que trustent* have concurred in the breach, they must be joined in a suit brought by one trustee against his co-trustee, Pomeroy Rem. § 260. Where a trustee sues merely to recover possession of the trust property from a third party the *cestui que trust* is not a necessary party to the suit, 22 Fed. Rep. 13; but where a bill filed by trustees seeks the sale of real estate vested in them in trust, and they have not a present absolute power of disposition over their estate, according to the terms of the trust, their *cestuis que trustent* are necessary parties, 39 N. J. Eq. 545. Several trustees must unite in actions brought by them, 33 How. Pr. 145; and if one of several trustees refuses to join, his co-trustees may maintain the action, making him a party defendant, 78 N. Y. 224. When an estate is conveyed to trustees jointly a right of survivorship exists, and suit may be maintained in the name of the survivor, 54 Miss. 117. Upon the death of a trustee pending suit, the action may be revived in the name of his executor, 14 Ala. 707.

§ 5006. Joinder of defendants. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein. [51 v. 57, § 35; S. & C. 955.]

Account. Creditors may be joined with the heir in an action against an administrator for an account, 1 D. 497. In an action

for an account a judgment creditor of plaintiff is a necessary party when the answer sets up that he has garnished the claim, 34 O. S. 294.

Agent. The principal can not have a joint claim against agent and persons contracting through him, 1 D. 156, 158. A sub-agent of an insurance company must join the agent with the company as defendants in an action for his part of the commissions, 27 O. S. 393.

Animals. A joint action will not lie against the owners of a herd of cattle for trespasses committed by such stock where each person owns a several and distinct portion, 46 Ia. 45; but separate owners of animals may be sued jointly for trespasses committed by them when kept in common, 25 O. S. 285, and under the joint control of all the owners, 70 Ill. 292, and several owners of dogs may be sued jointly in an action for injury to sheep, 24 O. S. 333 (S. & S. 10); see 1 W. L. M. 198, 389. Under the present statute they are, jointly and severally, liable for killing, worrying or injuring sheep, § 4213; see §§ 4206, 4250, 4251.

Assignment for creditors. In an action by attaching creditors of a firm against an assignee for the benefit of creditors, partnership creditors are not necessary parties, 29 O. S. 441. Where one of the makers of a joint note has assigned for the benefit of creditors, the remaining solvent parties need not be joined in an action against the assignee to compel an allowance of the notes, 2 Bull 246.

Assignor. In an action by the assignee of a judgment to subject equities of the debtor, the assignor who is indebted to defendant is a necessary party, 24 O. S. 204; 29 Bull 190; and an assignor is a necessary party when unliquidated damages on a contract are set off by the assignee, 3 W. L. M. 151; in a suit to quiet title where the assignments are conflicting, 3 W. L. M. 563; in an action by an assignee of an insurance policy for reformation and enforcement, 2 Bull 223; and an assignor of a non-negotiable note was formerly a necessary party in an action by the assignee, 2 W. L. M. 420; and an assignor was a necessary party in an action on a mortgage, but non-joinder was waived if not objected to, 2 W. L. M. 543; but see mortgage, 8 O. S. 2; 20 O. 474. An assignor of an account as collateral security is not a necessary party to a suit brought against the debtor by the assignee, 11 O. S. 374, 377, 378; but an assignor of part of a claim is a necessary party, 13 O. S. 495, 501; and in an action by the assignee of the right to commissions on renewals conveyed by the agent of an insurance company, the assignor is a necessary party, 27 O. S. 393, 396.

Attachment. In an action by plaintiff in attachment against a garnishee to recover money due from him to the defendant in attachment, the latter, who claims to have selected and to hold the same exempt from being applied to the payment of the plaintiff's claim, is a proper party to the action, 36 O. S. 545. A subsequent attaching creditor is not a proper party to an action by a prior attaching creditor, on the ground of interest acquired by levy of attachment on the same property, 9 O. S. 388; 12 O. S. 158. A garnishee in an action before a justice of the peace who is summoned to answer is not a party, 39 O. S. 218. Mortgagee is not a proper party where equity of redemption is attached, 33 O. S. 254. Defendant's wife not, 20 Bull 471.

Attorney against whom no fraud is charged or relief sought should not be joined in a proceeding to restrain the enforcement of a judgment for fraud, 2 Kelly, 325; but should be joined if charged with being a party to the fraud, 17 Cal. 467.

Bills and notes. Joint makers should be sued jointly, *Pomeroy Rem.* § 277. Those severally liable upon the same instrument may be included in the same action at the option of the plaintiff, 5 O. S. 586; § 5009. A guarantor (payee) and maker may be sued jointly, 26 O. S. 330, and the survivor and personal representative of a deceased joint maker may be joined in the same action, § 6102; 5 O. S. 586; but where one of the makers of a joint note has assigned for the benefit of creditors the remaining solvent parties need not be joined with the assignee, 2 Bull 246; 6 Rec. 284.

Bond. The action must be joint against all the obligors of a bond of a justice of the peace, 23 O. S. 543. An executor may be joined with a surviving obligor in an action on an administrator's bond, 1 D. 488; but in an action against the surviving obligors of a joint and several official bond the personal representatives of the deceased principal are not necessary parties, 25 O. S. 620. A devisee and executor may be joined in an action on a bond of a deceased surety 27 O. S. 398. In an action on an executor's bond under § 6215 the heirs, legatees, devisees, widow, or next of kin, or others who may be liable on account of assets coming into their hands, may be made defendants. In an action on a bond given by a partner to a retiring partner to pay firm debts, firm creditors may be joined as defendants, 9 O. S. 467. It is not a misjoinder to sue sureties on a guardian's original bond and those on his additional bond in a single action, 26 Bull 147.

Contractor. Joint contractors must be joined, 5 O. S. 514; 23 O. S. 543. In an action against a city for damages caused by the construction of a sewer, the contractor can not be joined with the city, 2 C. S. C. R. 158. In an action against the authorities of a city to restrain them from giving a contract to one not the lowest bidder, neither the contractor nor bidders are proper parties, 32 Barb. 37.

Debtor and creditor. Creditors are not necessary parties when represented by an assignee for the benefit of creditors, 29 O. S. 441. A judgment creditor is a necessary party where the answer sets up that he has garnished the claim, 34 O. S. 294. Debtors of defendant can not be joined in an action to recover a judgment against him, 1 H. 281.

Dower. Several separate owners can not be joined, 10 O. 127; 8 O. 418.

Ejectment. All persons in possession may be joined as defendants, 2 Met. (Ky.) 288; but if they occupy different parts of the same premises, 43 Barb. 261, or claim several and distinct parcels, 24 How. 277, they can not be joined, *contra* 2 Met. (Ky.) 288. If the persons in possession are mere trespassers, the plaintiff will not be forced to bring separate actions, 24 How. 277. A landlord of defendant is not a necessary, but proper, party, 24 O. S. 416. An inchoate right of dower is not such an interest as requires the joinder of the wife as co-defendant with the husband, 38 Barb. 25.

Executors and administrators are necessary parties in an action to enforce the payment of a claim against an estate, 45 Cal. 491; to charge real estate of decedent in the hands of heirs with the payment of debts, 5 O. 555; to subject assets devised for the payment of debts, 2 Duval 123; when a bill is filed for an account of the personal assets of decedent, 60 Barb. 372; to recover a legacy or distributive share of the estate, 2 Murph 336; (and the action may be brought against an executor, without joining his co-executor, when he has in his hands the balance remaining for distribution, 20 O. 310;) in an action for a pension, 11 O. S. 214; when charged with assets, or fraud or collusion is charged

between executors, 1 Green Ch. 74; when the fund sought to be distributed is in the hands of adverse claimants and the bill is filed for its recovery and distribution, 37 Ala. 93. The administrator and heirs of a deceased mortgagor should be joined as defendants in a bill to redeem, 8 O. 44; in specific performance against heirs on their ancestor's contract to convey lands, when damages are sought, 8 O. 377. An administrator of a minor receiving payment of a judgment obtained by the guardian is a necessary party to enjoin its collection, W. 390; see Bond. In executor's or administrator's proceeding to sell land to pay debts all persons claiming an interest in the land, 49 O. 8. 589.

Gaming. Players and owners of premises can not be joined in an action to recover money lost at gaming, 2 C. S. C. R. 12; and separate parties can not be joined, 6 Bull 636.

Guarantor. In this state a guarantor and principal debtor may be sued in one action, 26 O. S. 330; 31 O. S. 15; 16 O. 1; 18 O. 336; 17 O. 123; 5 W. L. M. 187; but this is not the rule generally elsewhere, 11 How. Pr. 218; 15 Ind. 144; 67 Mo. 324; 13 Wis. 670; Pomeroy Rem. § 409; with some exceptions, 30 Ia. 414; 11 Ia. 371; 24 Ia. 334. A guarantor (payee) of a note may be sued jointly with the maker, 26 O. S. 330; and a guarantor of a subscription may be joined with the subscriber in an action on it, 31 O. S. 15; see Id. 41. Where a guaranty of payment of a debt was made by husband and a wife having a separate estate, the wife and husband's administrator, but not the husband's heirs, were held proper parties defendant in an action on it, 6 Bull 288.

Heirs should be joined with administrator in bill to redeem, 8 O. 44, (1837), and in foreclosure, 1 D. 36; must be parties in administrator's sale, 12 O. 253; see 4 C. C. 7; specific performance when damages are sought, 8 O. 377. They are not necessary defendants in action by the executor for sale of premises for unpaid purchase money, 30 O. S. 491, 501; and when lands are directed by will to be sold and converted into money, the executor, and not the heir, is a necessary party to a suit concerning the disposition and charges on such estate, 83 N. C. 569. A joint action against several heirs, or devisees, can not be sustained under the act of 1831 when there is no joint contract either express or implied, 15 O. 338. In suits relating to the homestead, brought by the widow, the heir is a proper party, 43 Mich. 582; neither widow nor heir necessary or proper parties in action to recover money judgment against administrator, 3 C. C. 508.

Landlord and tenant. A lessee and one who guarantees the payment of the rent in the same instrument may be sued jointly in the same action, 23 N. Y. 286; 11 Ia. 323. Several tenants in common possession of stock may be jointly sued for trespasses committed by such stock, though the animals are owned by them separately, 25 O. S. 256.

Legatee necessary party to a bill to set aside a will, 35 O. S. 642. All legatees are necessary parties in a suit by one claiming as residuary legatee, 4 Johns. Ch. 202; but not in a suit to recover a specific legacy, Id. When the question arises as to the lapse of a legacy, a residuary legatee should be made a party, and a debtor legatee when the question arises as to whether or not his debt was discharged by the gift of the legacy, 27 N. J. Eq. 136. Assignors of a legacy who have disposed of all their interest are not necessary parties to a suit by an assignee, 2 Green Ch. 53. When decedent holding funds in trust specifically bequeaths them, the legatee is not a necessary party to a suit for their recovery brought against the executor, 14 Wis. 238.

Liquor laws. Two or more persons jointly selling liquor

under the act 1854, are jointly or severally liable, 26 O. S. 48; and two or more persons severally selling liquor are jointly liable, 40 O. S. 43. The act of 1854 amended, 67 v. 102, provides that "a wife . . . who shall be injured . . . in means of support . . . in consequence of the intoxication, or otherwise of any person, shall have a right of action in her name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part," together with the owner and lessor, ‡ 4357.

Master and servant can not be sued jointly, 8 O. S. 359; 2 C. S. C. R. 158; 7 O. S. 226; unless the work is in itself unlawful or necessarily injurious to third persons, 1 D. 327, 330; 34 O. S. 638; 8 O. S. 359.

Mechanic's lien. The owner is the only necessary party defendant, 25 N. J. Eq. 292; see 1 C. C. R. 30. Subsequent incumbancers are proper parties, 43 Md. 134; a contractor, 50 Mo. 159; or sub-contractor, 54 Cal. 219; but a contractor is not a necessary party in an action against the owner, 65 Ind. 367; and a mere agent need not be joined, 54 Cal. 219. An owner who has transferred his interest subsequently to the contract for labor and materials is not a necessary party when no personal judgment is demanded, 81 Ill. 183; or proper party, 37 Ind. 183; and a prior lienholder need not be made a party, 46 Md. 578. The wife must be made a party to enforce a mechanic's lien on the homestead, 46 Wis. 130. If the owner die, his administrator is a necessary party where suit is against the heir to enforce the lien, 3 Bradf. (N. Y.) 54; and where the owner has sold the property, taking a mortgage to secure the purchase money, his administrator, on his death, and not the heirs, are to be made parties with the present owner, 24 Ia. 298.

Mortgage. Foreclosure. The owner of the equity of redemption is a necessary party defendant, 10 Paige 409; in case of his death, his heir; 1 O. S. 369; 4 Bull 479; though the mortgage be of a term of years, 13 Ves. 234; and his personal representatives, 1 D. 36 (where the statute made the equity of redemption descendible to the personal representatives, 15 O. 735; and see 8 O. 446. The general rule is that the personal representatives are only necessary parties when a personal judgment for a deficiency is sought against the estate, Bliss Code Pl. ‡ 102; Story Eq. Pl. ‡ 175, 196); his devisees, 2 Hen. & M. (Va.) 6; 7 Paige 547; his legatees when legacies are made a special charge upon the mortgaged estate, 6 Johns. Ch. 450; otherwise they are not necessary parties, 60 How. Pr. 185; in case of bankruptcy, his assignee, 47 N. Y. 261; 90 N. Y. 538; see 31 O. S. 158; unless the assignment is made pending suit, 55 N. Y. 652. In case he has conveyed it, his grantee, 10 Paige 499; 10 O. S. 339 (several purchasers from the mortgagor may be joined, W. 729); and the grantee of a portion of the premises who has assumed the payment of the purchase money is a necessary party, 41 O. S. 143; after his death his heir, 1 Ind. 35. When the wife has joined in the execution of the mortgage she is a necessary party if it is desired to bar her rights, 15 O. S. 485; 16 O. S. 193; 28 O. S. 503; and if she did not, a proper one, 20 N. Y. 412; where she has a defense to the claim, 38 Wis. 408; but if she did not join in the mortgage and has no defense to the claim she is not a proper party, 55 N. Y. 7; see 28 O. S. 32. When it is sought to foreclose the homestead right, the wife should be made a party, 10 Cal. 296; but if the mortgage is made before marriage, she is not, in such case, a necessary, and, it seems, not a proper party, 29 O. S. 636; and she is not a necessary party in an action to foreclose a

mortgage executed by the husband, in which she did not join, to secure the purchase price, 2 C. C. R. 70; see 22 O. S. 485. *Cestui que trustent* in the foreclosure of a mortgage given by trustees are necessary parties, 14 O. S. 200; but when the beneficiaries are numerous, 2 Johns. Ch. 197; where the trust is for the benefit of creditors and the trustee has the legal estate, 9 Johns. 591, they are not necessary parties. *Tenants in common* must be joined when the mortgage is made by them, 3 J. J. Marsh 301. *Partners* should be joined, and at common law their heirs or personal representatives are not necessary parties, since the title vests in the surviving partner on the death of one, 1 Ala. 126; but in this state, under § 6102, the survivors might be joined with the personal representatives. Where there are *estates in remainder* or reversion after a life estate in the equity of redemption, only the holders of the life estates and the first person in being having a vested estate of inheritance need be joined, 2 Edw. Ch. 127; 7 Paige 544. A lessee of a term of years, where the lease is subsequent to the mortgage, should be made a party, 8 N. Y. 44; and an occupant or tenant in possession, McMull. Eq. (S. C.) 157, 196; but it has been held not an occupant without title, 10 Ia. 517. If the *mortgagor* has conveyed his equity of redemption absolutely, and no personal judgment is asked, he is not a necessary nor proper party, 34 Mich. 10; 21 Ia. 86; 53 Cal. 375; but if he has conveyed only a portion of the premises, 27 Ia. 214, or if he retain an interest in the property by reason of irregularity of sale under a subsequent mortgage, 48 Ala. 87, he is a necessary party; and if he has conveyed the premises by warranty deed, 15 Ia. 34; 21 Ia. 86 (Mr. Jones says these cases are not generally sustained, § 1403), or if a personal judgment is sought against him, 22 N. J. Eq. 478, he is a proper party. A mortgagee who has assigned his interest absolutely in the mortgage need not be made a party, 8 O. S. 1; 20 O. 474; 8 W. L. J. 371; but when he has assigned it as collateral security, 12 N. Y. 495, and still retains an interest in it, he should be made a party. Where several *notes* secured by a mortgage are *assigned*, an assignee can not unite as co-plaintiffs the holders of the other notes in an action to foreclose, on account of the severance of the debt and of the interests of the holders, but either holder may foreclose, making the other holders defendants, 9 Ia. 297; 45 Tex. 623. Subsequent mortgagees and incumbrancers are proper if not necessary parties, 51 O. S. 421, 431; Pomeroy Rem. § 342; Jones Mortg. § 1425 (Mr. Wiltie says they are necessary parties, but he does not seem to make the distinction between proper and necessary parties recognized by other writers, Wiltie on Parties in Foreclosure, § 61); and subsequent judgment creditors of the mortgagor having a lien upon the property, 10 N. Y. 356; but *mesne* purchasers who have conveyed their interests, unless they have assumed the payment of the mortgage, 45 Cal. 584; 3 Edw. (N. Y.) 472; purchasers and incumbrancers *pendente lite*, 4 Sandf. Ch. 381; persons claiming title adversely to the mortgagor, 96 U. S. 340, and prior incumbrancers, Jones Mortg. § 1439; Pomeroy Rem. §§ 334, 342; Wiltie on Parties in Foreclosure § 116 (that they are proper parties, Bates Pl. pp. 583, 584; Bliss Code Pl. §§ 109, 101), are neither necessary nor proper parties. A guarantor of the mortgage debt, 11 Mich. 155 (unless he has guaranteed that the mortgage debt is collectible, 9 Paige 80); and the maker of a note secured by a mortgage executed by another, 18 Cal. 491, or indorser or assignor, 47 Ind. 326; contra, 24 Cal. 879, unless a personal judgment is sought, are not necessary or proper parties. Where a *senior mortgagee* forecloses his

mortgage and sells the property without making the junior mortgagee a party, the rights of the junior mortgagee remain unaffected and are not prejudiced by such foreclosure, 30 O. S. 24; and the same rule applies where a junior mortgagee has assigned all his interest in the mortgage, and the notes secured thereby, to a third person who is not a party and is without notice of such proceedings, 43 O. S. 437; and though the assignee did not take a written assignment of the junior mortgage, nor obtain from the mortgagor a quit-claim deed of his equity of redemption and have the same recorded, he is not estopped from foreclosing the same, *Id.* *Redemption.* Mortgagees and assignees in whom is vested the legal title are necessary parties, 19 Ala. 213; and if a mortgagee has assigned his interest as collateral security, or assigned part of his interest, he is still a necessary party as is his assignee, 47 N. Y. 261. If he has made an absolute conveyance of the estate as security, his grantee must be joined with him, 4 Paige 259; and if the mortgage has been conveyed upon trusts declared, the trustee and *cestui que trust* should be made parties, 3 Mad. 255. On the death of the mortgagee his administrator is the only necessary party, 38 Mo. 349. A junior mortgagee must make the mortgagor or other representative of the realty a party, and the prior mortgagees as well, Jones Mortg. § 1102, and the person to whom the mortgage note has been transferred without assignment of the mortgage should be made a party to the bill, 46 Me. 445. A mortgagee who has assigned his mortgage note as collateral security for his own debt must be made a party to the bill as well as the person who received such assignment, 53 Me. 246. A devisee of the mortgagee in trust should be joined with the *cestui que trust* in an action by the mortgagor after condition broken for relinquishment of their interest in the mortgaged premises, 24 O. S. 97. *Miscellaneous.* A mortgagor and purchaser of fixtures should be joined in a suit by the mortgagee, 24 O. S. 369. Where money is advanced to parties holding a contract for a lot on the security of it, in a bill to enforce the security, the owners of the lot are necessary parties, W. 338. A bill seeking to obtain payment of a debt secured by mortgage is not multifarious, because it covers several tracts sold to various purchasers, making them all parties, W. 729. A mortgagee is a necessary party to an action by an executor or administrator to get possession of land fraudulently conveyed by decedent, § 6142; 19 O. S. 472; he was not prior to 1858, 11 O. S. 486; see 3 C. C. R. 144.

Municipal corporation. A necessary party in an action to restrain the collection of an assessment for laying sidewalk, 10 Kas. 510; not a necessary party in an action by a contractor on private contract with property holders to improve street, 4 Bull 909; 8 Rec. 357.

Quiet title. All persons necessary to a complete settlement of the action may be properly made parties, 18 Ia. 303. The holder of the legal title in trust and *cestui que trust* must be joined, 24 O. S. 97. An assignor, where the assignments are conflicting, is a necessary party, 3 W. L. M. 593; but an auditor applying payment of tax to the wrong land is not a proper party, 2 W. L. G. 315.

Records. Restoring lost, etc., see § 907c.

Reformation. When a contract is sought to be reformed on the ground of mistake, all persons interested should be made parties, 75 Ill. 423. If a misdescription, running through the deeds of several prior grantors, is sought to be corrected, such grantors, or, if dead, their heirs, should be made parties, 24 Ia. 486. If the

grantee has sold a portion of the premises thus misdescribed, and followed the misdescription in his conveyance, he should in seeking relief from his grantor make such grantee a party, 60 Ill. 307; but a county recorder who correctly copied the deed of record is not a proper party to the suit, 44 Ind. 221. In an action by an assignee of an insurance policy for reformation and enforcement the assignor is a necessary party, 2 Bull 223.

Replevin. Attaching creditor proper party to suit in replevin by mortgagee of personal property against sheriff holding property under legal process for satisfaction of judgment, 20 O. S. 34. National bank making loan on security of warehouse receipt for merchandise proper party defendant to suit in replevin by consignor and owner against warehouse keeper to whom same has been committed by consignee for storage, 40 O. S. 176.

Rescission and cancellation. In an action against a vendor and vendee to set aside and cancel a deed, both defendants are necessary parties, though not united in interest within the meaning of § 4987, 39 O. S. 563. When a conveyance is sought to be set aside on the ground that it is fraudulent as to creditors, the grantor is properly made a party, 44 Ia. 356; but if he be dead, his administrator is not a necessary party, 51 Mo. 259, and the heirs of the grantor are not necessary parties, 75 Va. 114. The grantees should be made parties whether fraud is charged or not, 40 Ia. 460, 466, unless they have conveyed their interest in the premises, 64 Mo. 292; and the heirs of the grantee should be joined, 4 Heisk 569. The executor and heirs of a deceased vendor are necessary parties to an action by the vendee in an executor's contract to sell realty seeking to rescind and to recover back the purchase money, 4 W. L. G. 352. In an action to set aside an award for misconduct of arbitrators, the arbitrators are not proper parties, 29 Barb. 465. A sheriff is not a necessary nor proper party in an action to set aside a deed of land given by him upon a sale under execution against plaintiff, 15 Ind. 155.

Sheriff not a proper party to enjoin levy of execution under a judgment, 1 C. S. C. R. 259, though the judgment creditor resides in another county, 1 Clev. Rep. 352, unless fraud or collusion is charged, 14 O. 445. In replevin against him for chattel mortgage property, attaching creditor may be joined as defendant, 20 O. S. 38; 1 H. 188.

Slander and libel. There is no joint action for slander—two defendants can not be joined—1 O. 36, 46; 38 Ia. 358; 4 Bull 596; 2 Clev. Rep. 260; but all concerned in the publication of a libel may be joined as defendants, 2 Abb. Pr. 430, Pomeroy Rem. § 313.

Specific performance. The parties to the contract themselves, or the persons who have become substituted in their place as heirs, and under certain circumstances executors or administrators, are the only proper parties plaintiff or defendant, Pomeroy Rem. § 366. When the vendee dies and the vendor sues for specific performance the personal representatives are defendants, since they pay the purchase money; but the heirs are necessary defendants, since the conveyance by the vendor will be made to them, Story Eq. Pl. §§ 160, 177; but if the vendee has devised all his interest in the contract, the devisees are necessary co-defendants with the personal representatives, Id.; 6 Johns. Ch. 402. When the vendor dies and the action is brought against the heirs, the personal representatives must be defendants when damages are sought, 8 O. 377; and in an action to recover compensation in lieu of specific performance, on the ground that specific performance has become impracticable, the real representatives of the deceased vendor are necessary parties, 38 O. S. 331. A third

person to whom the vendor has contracted to sell the land is a necessary party, 4 Lans. 132; and an assignee in bankruptcy of the vendor when the consideration has not been paid, 65 N. C. 34; and mortgagees and judgment creditors of the vendor, 4 Minn. 141, and a grantee of the vendor with notice of plaintiff's rights, 33 N. Y. 658, and intermediate parties who have acquired an interest in the land by assignment, etc., 2 A. K. Marsh 497, unless they have absolutely parted with their interest, 14 Gray 511, are proper parties. In an action to enforce a contract for the sale of land by a *cestui que trust*, the trustee must be made a party defendant, 7 Wis. 574; but an objection to the decree on the ground of his non-joinder will not avail if the vendee is content with the title, 10 O. 215. Where a husband, holding land in trust for his wife, contracted to sell it at her request, it was held that she need not be made a party, 18 O. S. 126. A wife signing a contract for the sale of real estate with her husband should not be joined with him in an action for specific performance, 1 H. 19, 21. An assignor of a title bond held as collateral has been held a necessary party in specific performance by the assignee, W. 706; see §§ 5797-5802; 3 C. C. R. 31.

Stockholder. In an action to enforce the individual liability of stockholders, all the stockholders must be united as defendants, § 3260; 41 O. S. 78. Any stockholder may insist that all stockholders be made parties, 17 O. S. 86; 17 O. S. 113; and before the enactment of § 3260 it was held that the corporation should be a party, 17 O. S. 113. Solvent assignees of stock prior to the judgment against the corporation are necessary parties, 37 O. S. 26. In a suit by a stockholder to subject to the claims of creditors and stockholders assets in the hands of a trustee of the corporation, appointed to settle up its affairs, the corporation or its legal representatives are necessary parties, 2 C. S. C. R. 19. Where the charter of a company provided that the directors were to levy an amount necessary to pay just claims on the stockholders *pro rata*, and that such assessments should be collected by action if not paid within sixty days after notice, such stockholders can not be joined in a suit against the company, 1 H. 217; see 44 O. S. 333. Administrator *de bonis non* of stockholder proper party in action to enforce statutory liability. *Id.*

Sureties. See §§ 5845, 5846. A surety suing for contribution need not join his co-sureties, 2 C. S. C. R. 54. The general rule is that all co-sureties must be made defendants in an action by a surety for contribution and the personal representatives of any that are dead, and also the principal debtor, Story Eq. Pl. § 169a; 7 B. Mon. 299; 4 Jones Eq. 455; but an insolvent principal and insolvent co-sureties need not be joined, 65 Ill. 425; nor a surety out of the jurisdiction, 6 Ired. Eq. 115; nor a creditor of the surety suing, to whom payment was made, 31 O. S. 406; but under § 5845 to compel the principal to pay the debt the creditor would be a necessary party, 31 O. S. 565. Sureties on the bond of executors or administrators are not necessary parties to compel them to account before the amount is liquidated, 1 D. 497, 500. A devisee and executor may be joined in an action on the bond of a deceased surety, 27 O. S. 898. It is not a misjoinder to sue the sureties on the guardian's original bond and those on his additional bond in a single action, 26 Bull 147.

Tax. See §§ 5849, 5850. When the owner of school lands seeks to enjoin the collection of and to have a tax levied upon such lands declared void, the county is a proper party to the proceeding, 21 Wis. 689. A city is a necessary party to a bill seeking to restrain the collection of city assessments for the payment of

sidewalks made in front of lots within its limits, 10 Kas. 510. A school district is a necessary party to a suit to restrain the collection of a tax levied for the purpose of paying interest on school-district bonds and to create a fund for the redemption of the bonds, 17 Kas. 361. In a suit by a stockholder to restrain the illegal taxation of a corporation the corporation must be a party, it having refused to bring the suit, 18 Wall. 626.

Trust. In an action to set aside a trust deed, the beneficiaries need not be joined, Pomeroy Rem. § 357; 4 Minn. 315; 25 Mo. 156; 93 U. S. 155; but in an action to enforce a trust, or settle it, the beneficiaries must be joined as plaintiffs or defendants, 28 How. Pr. 92; 22 O. S. 208; 7 Bull. 113; see 36 O. S. 17; and this is the general rule, except in the case of administrators and executors or assignees for the benefit of creditors, Story Eq. Pl. §§ 192, 193, 207; or where the beneficiaries are numerous, *Id.* §§ 118, 150. A trustee is a necessary party to an action to enforce the performance of an express trust, 9 Ia. 261; but if he has been divested of, 22 O. S. 208, or has parted with, his title, he is not a necessary party, 41 O. S. 368; and if he has absolutely assigned it the assignee alone should be sued, unless the assignment was a breach of trust, Story Eq. Pl. §§ 211, 213, 214. In an action by beneficiaries for a breach of trust, all the trustees should be parties, Story Eq. Pl. § 210, unless the breach of trust is in the nature of a tort, where there is no liability to contribution, or where the party omitted is a nominal trustee, having been discharged, or having disclaimed, Bliss Code Pl. § 109a; Perry on Trusts § 876; or where one seeks an account of so much of the trust fund as is in the hands of a particular trustee, or where the petition otherwise shows that such omitted parties have no interest in the controversy, Bliss Code Pl. § 109a. In case of a joint breach of trust the representatives may be joined with the survivors, 19 Fed. Rep. 471; see 53 N. Y. 483, 490. In actions to enforce a lien on or to reach property impressed with an implied trust, the person in whom the legal title is vested is a necessary party, Pomeroy Rem. § 359; 31 Ind. 106; but in enforcing a claim for services rendered a trust estate, the *cestui que trust* is not a necessary party, 8 Hun 4; 69 N. Y. 609. Assignees of an indemnity trust deed may pursue the trust fund against the heirs of a deceased grantor without making the widow, personal representative or assignor a party, 16 O. 66. Persons having an equity in lands or contract with the trustee of military land-warrants are necessary parties to a suit in chancery by the *cestui que use* to compel the legal title to such warrants and entries and surveys under the same, 14 O. 109; see *Id.* 323.

Unincorporated lodge or association. All the members are proper parties, 4 Bull. 513; see 2 C. C. R. 340.

§ 5007. Parties refusing to join as plaintiffs made defendants. Parties who are united in interest must be joined, as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff can not be obtained, or, if he is insane, and the consent of his guardian can not be obtained, or he has no guardian, and that fact is stated in the petition, he may be made a defendant. [51 v. 57, § 36; S. & C. 956.]

All the defendants in a joint judgment are necessary parties to a petition filed by one of their number to reverse it, and may be made so, as plaintiffs or defendants in conformity with the

provisions of secs. 34, 35, and 36 of the Code as to parties to civil actions, 14 O. S. 237. A judgment against one of two partners upon a joint promise, is a bar to a subsequent suit against both, 18 O. 279; see 23 O. S. 543; see § 4993; 11 O. S. 374; 38 Cal. 514; Bliss Code Pl. §§ 77, 78; Bates Pl. p. 33 51 O. S. 438.

If consent can not be obtained, etc., the fact must be stated in petition, 11 O. S. 378.

§ 5008. When one or more may sue or defend for all. When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. [51 v. 57, § 37; S. & C. 957.]

See § 5005 (Injunction—Tax-payer). One may sue on behalf of others similarly situated to restrain the collection of an alleged illegal tax or assessment, 24 O. S. 232; see 5 O. S. 361; contra, 10 O. 235; but when it appears that those represented are divisible into classes whose rights and liabilities are not necessarily the same, he can only act on behalf of those of his own class, 29 O. S. 500, 508; and if the party named as plaintiff who sues on behalf of himself and others fails in his suit, those whom he represents must also fail, Id. 510. One may sue on behalf of himself and others to foreclose a railroad mortgage, 35 O. S. 307, 315; to enforce the statutory liability of stockholders, 17 O. S. 113; and in *quo warranto*, 22 O. S. 411, 426; to enjoin collection of liquor tax, 44 O. S. 555, 556; unincorporated joint stock company, 50 O. S. 703; see 19 O. S. 78; 2 C. C. R. 241; 10 C. C. 378; to enjoin on behalf of others situated on the same street the construction of a street railroad, 30 Bull 213. Tax payer can not sue on behalf of himself and others to recover back tax, when, 31 Bull 234.

§ 5009. Persons severally liable. One or more of the persons severally liable on an instrument may be included in the same action thereon. [51 v. 57, § 38; S. & C. 957.]

See § 5005 (Bills and notes—Guarantor). As a guarantor (payee) and maker of a note, 26 O. S. 330; 7 Kas. 331; 11 Ia. 371; 24 Ia. 334; or sued separately, 31 O. S. 566; a guarantor of a subscription and subscriber, 31 O. S. 15; or may be sued separately, Id. 41; a guarantor of payment of rent may be sued jointly with the lessee, 11 Ia. 323; contra, 15 Ind. 144; when the guaranty is included in and made part of the original agreement, 23 N. Y. 236. In this state the survivor and personal representatives of a deceased obligor may be joined in the same action whether the contract be joint or several, § 6102, 5 O. S. 586; 42 O. S. 302; generally, 3 C. C. R. 620, 624.

§ 5010. Parties to written instrument by initial letter. Parties to a written instrument by initial letter, or a contraction of the name, may be so designated in an action thereon. [51 v. 397, § 1; S. & C. 1139.]

7 Neb. 245.

§ 5011. How partners may sue or be sued. A partnership formed for the purpose of carrying on a trade or business in this state, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known; and in such case it shall not be necessary to allege or prove the names of the individual members thereof. [44 v. 66, § 1; S. & C. 1138.]

See §§ 5042, 5381. *Actions by partners.* A partnership suing in its firm name must bring itself within the provisions of this section, and omission to do so is ground of demurrer, 13 O. S. 210, 216 (see 11 C. C. 269; 50 O. S. 707; 4 W. L. M. 25). Unless the action can be brought in the firm name all the members must join in a suit for the collection of a partnership claim, 20 O. 132; as for the recovery of the price of goods sold by the firm, 1 Daly 416; 10 How. Pr. 162. However numerous the members, 5 Abb. N. Cas. 102, one can not sue on behalf of himself and others, 1 C. S. C. R. 331; as in an action against an inn-keeper for loss of goods, 1 E. D. Smith 51; in an action for damages for deceit in the purchase of real estate for partnership purposes, 6 Met. 246; in an action for libel published concerning them in their joint business, 1 Chitty Pl. 64. All except dormant, 20 O. 132, and retiring partners, 27 O. S. 1, must join; though it has been held under the code that a dormant partner is a necessary party plaintiff, 4 Duer 416; contra, 49 Barb. 403. In case of insolvency actions to collect partnership demands should be in the name of the solvent partner and the assignee or the purchaser at execution sale, Bliss Code Pl. § 656; and likewise in case of voluntary assignment of the partnership interest, Id. § 65c. In case of dissolution the action should be in the name of all the partners in settling up the partnership affairs, Bates Pl. p. 647. Where one of the partners has died the right of action remains in the surviving partners without joining the administrator of the deceased partner, 10 O. 445. Liability for rent, 19 Bull 105. Illegal association, 34 Bull 95.

Actions between partners. Partners can not, in general, sue each other during the existence of the partnership relation, 1 E. D. Smith 215; W. 764; or the firm of which they are members, W. 220, for any of the business or undertakings of the firm, 5 Cal. 300, unless there has been an account and ascertained balance, 19 O. 44; 26 O. S. 567, 570; 11 Bull 199; W. 764; Pomeroy Rem. § 104; or an express promise, 12 O. 300; 5 O. 514; Pomeroy Rem. § 104. One partner may, therefore, sue another for damages sustained by a breach of the partnership agreement, 12 Hun 15; 18 O. 532 (those who have sold out their interest before the matter in controversy arose need not be made parties, 18 O. 532); for damages caused by premature dissolution on breach of partnership articles, 6 Seld. 489; for a breach of promise to advance capital, 5 O. 514. One partner may sue another on contracts distinct from the partnership business, 12 Nev. 225; for torts not connected with the firm, Collyer on P'tshp. § 404. And one firm may sue another, having a mutual partner, for an ascertained balance, 18 N. Y. 74; see 4 W. L. G. 81; 2 D. 499; and such mutual partner may elect to be plaintiff or defendant, 18 N. Y. 74; and when one who is a member of two firms makes a promissory note in the name of one firm payable to a person who is a member of the other firm, the payee may sue and recover upon

it at law, 12 O. 300. After a settlement each must sue separately for his share. Two can not join in an action against one, 17 O. S. 323. The fact that the cause of action is not joint but several in its character constitutes a good defense; and where such defect appears upon the face of the petition it may be demurred to, but the right to make such defense by answer is not waived by a failure so to demur, 17 O. S. 323. Where a retiring partner took a bond from his late partner conditioned to pay firm debts, the firm's creditors were held necessary parties in an action by such retiring partner against the obligors of the bond, 9 O. S. 467. An administrator of a deceased partner can not maintain an action at law against the surviving partner to recover money loaned the firm by the intestate while he was a member of such firm, 24 Bull 376. Petition for settlement, see 46 O. S. 652; 2 N. P. 329.

Actions against partners. An action may be brought against a partnership in its firm name, provided it is formed for the purpose of carrying on a business within the state or holding property therein, 13 O. S. 210; 18 O. S. 134 (Proceeding in garnishment). A foreign partnership does not come within the provisions of the statute, 1 H. 188; but if in an action against it in its firm name a verdict against it is taken without objection to the irregularity it will be held to have waived the objection, Id. The court may in its discretion permit an amendment of the petition, Id., but the process can not be amended, 1 H. 574; and an amendment substituting individual names requires a new service, 2 D. 586. When the action can not be brought against the firm in its firm name, it must be brought against all the partners. For a tort arising from the act or negligence of one partner in the course of the partnership business all the members are liable as partners, 58 N. Y. 613; 49 Ala. 121. Plaintiff may treat the tort as several, and sue all or any of the tort feorsors, 12 Rich. 600. All except dormant partners should be made defendants, 31 Md. 179. Dormant partners, it is held, may be joined, 8 H. L. C. 268; but their non-joinder will not be ground of plea in abatement when plaintiff did not know of their existence, 19 Wend. 525. Upon the death of a partner his personal representatives and the survivor may be joined in the action, 42 O. S. 302. They may be sued jointly or separately, Id. ‡ 6102. If a partner assigns, the solvent partner must be sued alone, Bates Pl. 649; if the firm assigns for the benefit of creditors, the action must be brought against the assignee to compel an allowance of the claim, Id., and partnership creditors are not necessary defendants in such action, 29 O. S. 441. When members of a partnership form a new firm, debts must be recovered in an action against the old firm, 17 Pa. St. 67, unless the new firm agreed to assume the debts of the old, Bates Pl. 649. Neither corporations *de jure* nor *de facto* are within these provisions. No action can be maintained to charge stockholders with the payment of a judgment against a corporation *de facto*, 38 O. S. 269. When persons who have taken steps toward incorporation, and who conduct business in an associate name may be charged in an individual liability as partners, 40 O. S. 9. Partnership can not be served by publication, 39 O. S. 249. Administrator of deceased partner can not sue surviving partner at law to recover money loaned firm by intestate while he was member of such firm, 24 Bull 376.

‡ 5013. When action shall not abate. Marriage, disability of party, or transfer of interest. Upon the marriage of a female who is a party, the action shall not abate, but

if it is necessary that the husband be joined therein, he may be made a party with his wife; upon the disability of a party, the court may allow the action to continue by or against his representative, or successor in interest; and upon any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted for him. [51 v. 57, § 39; S. & C. 958.]

See § 5149. In replevin the owner of personal property may be substituted as defendant in place of his agent, 23 O. S. 622. The mode provided in § 5150 for revivor of actions, is not exclusive, but under this section the court has power to allow the action to be prosecuted by or against the representative or successor in interest of a deceased person, 24 O. S. 182; 29 O. S. 86. Former rule as to female, 7 O. (1 pt.) 179. Plaintiff in a pending action does not divest himself of his interest therein, nor of the right to prosecute the same by his voluntary application to become a bankrupt, 28 O. S. 90.

§ 5013. When proper parties are not all before the court. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy can not be had without the presence of other parties, the court may order them to be brought in, or dismiss the action without prejudice. [51 v. 57, § 40; S. & C. 958.]

The last clause of this section was mandatory in the code of 1853, 14 O. S. 302, 306. The power given to the court to bring in additional parties does not apply where the plaintiff's right to maintain the action depends on the presence of such additional parties, but only when he can sustain the action against the original party; but a new party is necessary to its complete settlement, Bates Pl. p. 62, citing 12 Hun 236; Pomeroy Rem. 420. In an action by a creditor to enforce liability of stockholders where no equities between stockholders are to be adjusted, a court may determine the controversy before it without prejudice either to the right of those already in court or of those yet to be brought in, 44 O. S. 334. Where the presence of an absent party is essential to the determination of the controversy the parties can not waive the objection on account of defect of parties. The court in such case must order the party to be brought in, 35 O. S. 642. Subsequent amendment of petition in which attachment has been issued can not enlarge scope of attachment so as to affect other parties, 2 C. C. 110. In action to subject shares of stock to payment of judgment court may order any person having interest in the stock to be made a party, 21 Bull 813. In an action to enjoin collection of street assessment, it is the duty of the court to require the city to be made a party, 38 O. S. 314; see generally 4 C. C. 368; 5 C. C. 593.

§ 5014. Person claiming an interest in property made party. In an action for the recovery of real or personal

property, a person claiming an interest in the property may, on his application, be made a party. [51 v. 57, § 41; S. & C. 958.]

§ 5015. When officer holding execution may be joined in the action. An officer holding an execution may be joined in an action to restrain the collection of the same in the county in which he resides, with the person for whose benefit the writ issued, when such person is a non-resident of the state, or has left the same to avoid the service of a summons or order of injunction, or so conceals himself that process can not be served upon him; and service may be made against such person by publication, as in other cases. [56 v. 93, § 1; S. & C. 1172.]

14 O. 445; 10 O. 268, 272. 8 C. C. 614.

§ 5016. Interpleader. Upon affidavit of a defendant before answer, in an action upon contract, or for the recovery of personal property, that a third party, without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same as the court may direct, the court may make an order for the safe-keeping, or for the payment or deposit in court of the subject of the action, or the delivery thereof to such person as it may direct, and also an order requiring such third party to appear in a reasonable time, and maintain or relinquish his claim against the defendant; and if such third party, having been served with a copy of the order, by the sheriff, or such other person as the court may direct, fail to appear, the court may declare him barred of all claim in respect to the subject of the action, against the defendant therein; but if he appear, he shall be allowed to make himself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the court for the payment, deposit, or delivery thereof. [51 v. 57, § 42.]

When subject of action shown by petition is different from subject of action shown by answer and cross petition, no interpleader should be allowed, 51 O. S. 6.

The code interpleader is a cumulative remedy, and does not impair the chancery interpleader, and applies when the whole controversy turns upon the right of property or a contract or fund in dispute, 3 W. L. M. 20. The question of ownership is to be tried by the court, and may be appealed, Id. A stakeholder, W. 476, an owner of a building as between contractors, 1 Bull

150; 13 Bull 361, may interplead. Two parties claiming to be a religious society may be required to interplead, 25 O. S. 128; and an interpleader may be had where the collection of a judgment assigned to different parties is enjoined, 1 C. C. R. 563; when insurance policy is claimed by various parties, 5 C. C. 587. The case is not changed to a "special proceeding" by bringing in and making a new party in lieu of the original defendant, 24 O. S. 336; In action brought by mechanic's lien holder against owner to enforce his lien, the head contractor owing the account may be substituted as defendant under this section, 1 C. C. 31. That defendant has demurred to the petition before the affidavit and other proceedings in interpleader does not authorize a judgment against him personally, 3 Bull 865; no appeal in action to recover money only, 24 O. S. 336; attachment, 9 C. C. 378.

§ 5017. **Interpleader on application of officer.** An officer against whom an action is brought to recover personal property taken by him on execution, or for the proceeds of such property sold by him, may, upon exhibiting to the court the process under which he acted, with his affidavit that the property was taken or sold by him under such process, have the benefit of the provisions of the preceding section, against the party in whose favor the execution issued. [51 v. 57, § 43; S. & C. 958.]

§ 5018. **Substitution of plaintiff in execution for officer.** In an action against an officer for the recovery of property taken under an execution or attachment, the court may, upon application of the defendant, or of the party in whose favor the execution or attachment issued, permit the latter to be substituted as the defendant in such action, security for costs having been given, or the court may order such substitution to be made, on application of the officer. [80 v. 138; 51 v. 57, § 44; S. & C. 959.]

17 O. S. 158; 6 Kas. 365; 13 Kas. 112. This section vests the court with discretion to grant or refuse the application, 12 O. S. 189. The substitution must be made before final judgment, 8 Neb. 466. When the owner is substituted as defendant in place of his agent, against whom replevin was brought, the sureties on the replevin bond are not released, 23 O. S. 622.

CHAPTER IV.

JOINDER OF ACTIONS.

§ 5019. **What causes of action may be joined.** The plaintiff may unite several causes of action in the same petition, whether they are such as have heretofore been denominated legal or equitable, or both, when they are included in either of the following classes:

1. The same transaction, or transactions connected with the same subject of action.
2. Contracts, express or implied.

3. Injuries to person and property, or to either.
4. Injuries to character.
5. Claims to recover the possession of personal property, with or without damages for the withholding thereof.
6. Claims to recover real property, with or without damages for the withholding thereof, the rents and profits of the same, and the partition thereof.
7. Claims against a trustee, by virtue of a contract, or by operation of law. [51 v. 57, § 80; S. & C. 967.]

1. Account and mechanic's lien, 3 W. L. M. 645. Assault and battery and false imprisonment, 6 Kas. 94 (assault and battery and slander held not joinable, 53 Barb. 238, 244, overruling, 15 How. Pr. 286). Count upon indebtedness and promise by administrator as such and one upon indebtedness and promise of intestate, 6 O. 92. Breach of warranty and fraud in sale of horse, 5 W. L. M. 37; contra, 12 How. Pr. 331; see Pomeroy Rem. § 467, 477*nn*. Breach of contract to furnish and print book from stereotype plates and injury to plates, 4 Abb. Pr. 176. Injunction and damages, 8 O. 60; 13 O. 135; 31 O. S. 209. Legal and equitable causes, 8 O. S. 215. Penalty for exacting excessive railroad fare and damages for ejection of passenger; see 29 O. S. 126; but see 19 Blatchf. 388 (ejection on different trip). Different penalties against railroad company, 37 O. S. 265; see 33 O. S. 384. Promise to marry and to pay money, 2 Clev. R. 57. Purchase money and lien, 33 O. S. 376. Reformation of contract and judgment, 21 O. S. 119. Revivor and personal judgment, 35 O. S. 430. Slander and malicious prosecution, 15 O. S. 173. Stock subscription and individual liability, 20 O. S. 190; see 24 Bull 133. Tort and contract, when arising out of the same transaction, etc., 8 O. S. 218; but an action against one as executor and against him in his own right are not joinable, T. 203; nor an action for divorce and specific performance, 1 Clev. R. 57. Insurer and reinsurer are not joinable as defendants, 1 H. 217; nor master and servant, 7 O. S. 226; 21 O. S. 212; unless the act ordered to be done is a tort, 7 O. S. 226. Proceeding in aid is not joinable with action to recover the judgment, 1 W. L. M. 571; nor separate and distinct claims, 16 O. 373; nor an action for slander against two, 4 Bull 596; nor tort and contract, unless they arise out of the same transaction, etc., 8 O. S. 218.

2. See cases, *supra*, 6 How. Pr. 379; 10 Kas. 131; 24 N. Y. 130; 51 How. Pr. 301; but those arising on contract inconsistent with each other can not be joined, 94 N. Y. 22, 26; see 2 H. 169; 2 D. 574, 584; N. Y. Code Civ. Proc. § 484; 1 N. P. 79.

3. Trespass to person and property arising out of the same transaction, 1 Dill 351. Several causes of action for penalties against railroad company, 37 O. S. 265, 272. Damages for injury to property before and after assignment, 1 D. 58.

4. Slander and malicious prosecution, 15 O. S. 173.

5. §§ 5814-5831. Replevin and injunction are not joinable, 1 C. S. C. R. 259.

6. 8 O. S. 423; 28 Kas. 482; see 27 O. S. 110; 12 Neb. 543; but an action for rent under a lease and for the recovery of possession as upon a forfeiture are not joinable, 10 Bull 339; 2 D. 471, 574, 584.

§ 5020. Requirement. The causes of action so united must not require different places of trial (1), and, except as otherwise provided, must affect all the parties to the action (2). [51 v. 57, § 81; S. & C. 968.]

1. It must appear upon the face of the petition that they do not require different places of trial, according to the N. Y. Code, Civ. Proc. § 484. 2. 1 H. 217, 233; see 42 O. S. 237; 9 C. C. 471; 58 N. Y. 237; 41 How. 418; 8 C. 60 Barb. 372; 15 Abb. N. S. 137; in the same right, T. 203. An executor can not be charged personally and in his representative character, *Id.*; but it is not necessary that all the parties should be equally affected, 50 How. Pr. 506.

§ 5021. Actions to enforce liens. In an action to foreclose a mortgage given to secure the payment of money, or to enforce a specific lien for money, the plaintiff may also ask in his petition a judgment for the money claimed to be due; and such proceedings shall be had, and judgment rendered thereon, as in a civil action for the recovery of money only. [61 v. 9, § 1; S. & C. 575.]

See § 5316. This section applies only where the party against whom the lien is sought to be enforced is also personally liable for the debt secured by the lien, 31 O. S. 568; 21 O. S. 277; but it is permissive and does not require the two remedies to be demanded in the same action, 40 O. S. 520. In order that a personal judgment may be taken against the mortgagor, the petition must contain a prayer for such judgment, 31 O. S. 80; but the court may order an execution to issue for any balance after exhausting the proceeds of the mortgaged property, *Id.* And that no personal judgment is demanded is no bar to an action upon the note against the maker for such judgment, 40 O. S. 517. The section does not confer authority to render a personal judgment upon constructive service only, 21 O. S. 142, 149. Prior to the passage of this act (1864), it was held that an action to foreclose a mortgage could not be joined with an action on the note secured by it, 6 Rec. 440; and the supreme court expressed a doubt as to the joinder of the two causes of action, 10 O. S. 438, but held that since no objection on that ground was raised in the court below it was waived on error, *Id.* Since its passage, such causes of action have been held joinable, 19 O. S. 687; 29 O. S. 611, 616; 31 O. S. 499; and though the mortgage is executed only by part of the makers of the note, judgment may be had against all of them in a single action, 19 O. S. 587. Following the principle of these cases, the court held that a cause of action against a tenant under 80 v. 164 (Scott Law) for the tax and penalty was properly joined with one to enforce the lien against him and the owner of the premises, 42 O. S. 237. The right to this double relief is not confined to actions to foreclose mortgages but extends to all actions in which a specific lien for money is sought to be enforced, 35 O. S. 430, 435. In foreclosure against mortgagor and his grantee, grantee may appeal though petition asks for personal judgment against mortgagor, 31 O. S. 568. In an action to marshal liens, defendant cross-petitioner taking an appeal not allowed to file supplemental pleading asking for personal

judgment, 4 C. C. 498. A civil action brought under this section against a party personally liable for a debt secured by a lien, where no equitable issue is made by the subsequent pleading, is not appealable, 7 C. C. 5.

CHAPTER V.

VENUE OF ACTIONS.

§ 5022. When action to be brought in county where property is. Actions for the following causes must be brought in the county in which the subject of the action is situate, except as provided in the next two sections:

1. For the recovery of real property, or of an estate or interest therein.

2. For the partition of real property.

3. For the sale of real property under a mortgage, lien, or other incumbrance or charge. [51 v. 57, § 45; S. & C. 959.]

9 Kas. 397; McCahon's R. 118. Action to subject debtor's interest in land to payment of judgment, 13 O. S. 514; by administrator to charge incumbered lands with payment of debts, 20 O. S. 539, 549. An execution creditor's suit to set aside a fraudulent conveyance of land by a debtor is local and not transitory and hence is maintainable in the county where the land lies, though the judgment was obtained and all the parties reside in another county, 29 Bull 225. No jurisdiction for failure to state cause of action for foreclosure, etc., 4 C. C. 242.

§ 5023. When property is situated in more than one county. When the property is situate in more than one county, the action may be brought in either; but in actions to recover real property, this can only be done when the property is an entire tract. [51 v. 57, § 46; S. & C. 959.]

47 O. S. 117, 129.

§ 5024. Action for specific performance. An action to compel the specific performance of a contract of sale of real estate may be brought in the county where the defendants, or any of them, reside. [51 v. 57, § 46; S. & C. 959.]

13 O. S. 571. Specific performance may be decreed of agreements to convey lands lying without the state where all of the parties are within the jurisdiction of the court and served with process, 14 O. S. 302; 24 O. S. 474. Such actions are "addressed to the sound legal discretion of the chancellor," 14 O. S. 307; 43 O. S. 178; against non-resident, 15 O. 447; see 32 Bull 199.

§ 5025. Where the cause of action arose. Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

1. For the recovery of a fine, forfeiture, or penalty imposed by a statute, except that, when it is imposed for an offense committed on a river, or other water-course, or a road, which is the boundary of the state, or of two or more counties, the action may be brought in any county bordering on such river, water-course, or road, and opposite to the place where the offense was committed.

2. Against a public officer, for an act done by him in virtue or under color of his office, or for a neglect of his official duty.

3. On the official bond or undertaking of a public officer. [51 v. 57, § 47; S. & C. 959.]

26 O. S. 200; 8 Kas. 80; 5 Kas. 220; N. Y. Code Civ. Proc. § 983, slightly different, 43 N. Y. 224.

§ 5026. Against domestic corporations. An action other than one of those mentioned in the first four sections of this chapter, against a corporation created under the laws of this state, may be brought in the county in which such corporation is situate, or has, or had its principal office or place of business, or in which any corporation has an office or agent; but if such corporation is an insurance company, the action may be brought in the county wherein the cause of action, or some part thereof, arose; and if such corporation be organized for the purpose of mining, either exclusively, or in connection with other business, the action may be brought in any county where such corporation owns or operates a mine or mines and the cause of action, or some part thereof, arose. [82 v. 5; 74 v. 29, § 48.]

This section is not applicable to statutory actions in which a different rule or mode of proceeding is specially authorized, 15 O. S. 409, 411. The section includes life as well as fire insurance companies, and an action on the policy may be brought in the county where the death of the insured occurred, 36 O. S. 544. Insurance company, see 6 C. C. 278.

§ 5027. Against railroad and stage companies. An action against the owner or lessee of a line of mail stages, or other coaches, for an injury to person or property upon the road or line, or upon a liability as carrier, and an action against a railroad company (1), may be brought in any county through or into which such road or line passes. [63 v. 87, § 49; S. & S. 542.]

1. 37 O. S. 649; 1 C. C. R. 112, 114 (leased road). It is not necessary that the petition should state that its road passes into or through the county where the action is brought, 47 O. S. 207. A widow residing in Pennsylvania can bring an action for the wrongful death of her husband in the common pleas court of this state though the injuries received and death resulted in Pennsylvania, 25 Bull 396; see § 6134a Probate Code.

§ 5028. Turnpike companies. An action other than one of those mentioned in the first four sections of this chapter, against a turnpike road company, may be brought in any county in which any part of the road lies. [51 v. 57, § 50; S. & C. 960.]

§ 5029. When charter prescribes place. When the charter of a corporation created under the laws of this state prescribes the place where suit must be brought, that provision shall govern. [51 v. 57, § 51; S. & C. 960.]

18 O. 455; 6 O. S. 600; 6 C. C. 278.

§ 5030. Non-residents. Foreign corporations. An action other than one of those mentioned in the first four sections of this chapter, against a non-resident (1) of this state, or a foreign corporation (2), may be brought in any county in which there is property of, or debts owing to, the defendant, or where such defendant is found; but if the defendant is a foreign insurance company (3), the action may be brought in a county where the cause, or some part thereof, arose. [51 v. 57, § 52; S. & C. 960.]

1. Non-resident must be personally served or appear, to give the court jurisdiction, unless the action is one in which service by publication can be made, 28 O. S. 451. 2. In attachment cases, under § 23 of Justices' Code 1853, words "foreign corporation" mean foreign to the state, not foreign to the county, 12 O. S. 139. 3. "This clause was intended to give an additional remedy against foreign insurance companies doing business in this state; namely, to make them liable to actions in the county where the causes of action arose, although they might not have property or debts due in such county, or might not even be found in such county," 37 O. S. 371. The general rule here declared has no reference to actions upon causes arising in this state. Any foreign corporation which may be found in this state may be sued in any county of this state in any court having jurisdiction of the subject matter of the suit. *Id.* Generally, 21 Bull 122; 8 C. C. 674. Action in attachment within meaning of section, 3 N. P. 109, 112; see 51 O. S. 29.

§ 5031. General rule as to other actions. Exception. Every other action must be brought in the county in which a defendant resides or may be summoned, except actions against an executor, administrator, guardian, or trustee, which may be brought in the county wherein he was appointed or resides, in which cases summons may issue to any county. [70 v. 138, § 53.]

The word "defendant," as used in this section, does not mean a nominal defendant merely, but one having a real and substantial interest adverse to the plaintiff, 11 O. S. 374, 378; see 41 O. S. 317. An action for damages for negligence, etc., causing death, may be brought in any county where a defendant resides or may be summoned, 32 O. S. 595. When it happens that defendants sued as joint contractors are not such, the one residing in a foreign county where he was served should be dismissed from the action, 4 O. S. 436. Service on one brought within the jurisdiction by requisition held invalid, 40 O. S. 130. *Quo warranto*, 34 O. S. 365. Service on a person in another county than that of his residence into which he has gone to attend the hearing of an injunction in a case in which he is a party is not good service, 46 O. S. 38. In an action for foreclosure in which plaintiff asks a personal judgment such judgment may be rendered against a defendant served with process in the county other than that in which the lands lie, and the action is brought, 29 O. S. 611, 614. It seems that an action to subject lands of a debtor to the payment of a judgment need not be brought in the county where the land is situate, but may also be brought in the county where the judgment was rendered, 13 O. S. 514, 520. A summons issued from the superior court to the sheriff of Hamilton county can be properly served upon one of the defendants outside the city limits and within the county where another defendant having a real and substantial interest in the action adverse to the plaintiff is properly served within the city limits, 2 C. S. C. R. 215. This section has no reference to suit against corporations, 15 O. S. 409; see generally 7 Kas. 337; 4 Kas. 370; 1 Kas. 170; 44 O. S. 613, 628; action against executor, etc., 51 O. S. 90.

§ 5032. Change of venue. When it appears to the court that a fair and impartial trial can not be had in the county where the suit is pending, the court may change the place of trial to some adjoining county; and if the application is made in the superior court, the change shall be made to another superior court, or to the court of common pleas of an adjoining county. [51 v. 57, § 54; 54 v. 10, § 1; S. & C. 392, 961.]

An application for a change of venue is addressed to the sound discretion of the court, 11 O. S. 128; and there must be clear and satisfactory proof that an impartial trial can not be had to justify its allowance, *Id.* An objection that the removal is not to the nearest county must be taken before trial or else it is waived, 9 O. S. 606. § 550, 86 v. 363, provides for a change of venue in the common pleas court when a judge is interested in the cause. The interest which requires the removal of a cause un-

der that section is a pecuniary interest of the judge in the event or result of the trial, 37 O. S. 153; and the clerk of the court may be compelled by mandamus to make the required order and certificate for such change when the proper affidavit has been filed with him, 43 O. S. 324; see 46 Id. 178.

§ 5033. Change of venue in case of Corporations.

When a corporation having more than fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he can not, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties. [50 v. 100, § 1; S. & C. 1140.]

§ 5034. Privilege of members of legislature. A member of the senate or house of representatives, or an officer of either branch of the general assembly, shall be privileged from answering to any suit which may be instituted against him in a county other than the one in which he resides, upon a cause of action which accrued ten days before the first day of the session of the general assembly of which he is an officer or a member; and all proceedings in actions to which any such person is a party shall be stayed during such session, and during the time necessarily employed in going thereto and returning therefrom. [29 v. 341, § 1; 59 v. 6, § 1; S. & C. 84; S. & S. 18.]

4 W. L. M. 215.

CHAPTER VI.

JURISDICTION BY SUMMONS, PUBLICATION, OR APPEARANCE.

SUBDIVISION I. ACTUAL SERVICE.

§ 5035. **How civil action commenced.** A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon. [51 v. 57, § 55; S. & C. 961.]

The jurisdiction of a cause attaches on filing the petition and issuing summons, 2 D. 336; 33 O. S. 523. An attachment issued without a petition gives no priority, 35 O. S. 661. The summons forms part of the record and indicates from its date the commencement of the suit, 5 O. 225; see 6 C. C. 270; 2 N. P. 12. Summons must be issued whether service can be had only by publication or not, 1 N. P. 124.

§ 5036. **Precipe.** The plaintiff shall also file with the clerk of the court a precipe, stating therein the names of the parties to the action, and demanding that a summons issue. [51 v. 57, § 56; S. & C. 961.]

§ 5037. **Requisites of summons.** The summons shall be issued and signed by the clerk (1), and be under the seal of the court from which it is issued; its style shall be "The State of Ohio, — county," and it shall be dated the day it is issued; it shall be directed to the sheriff of the county, who shall be commanded therein to notify the defendant that he has been sued, and must answer at a time stated therein, or the petition will be taken as true and judgment rendered accordingly; when the action is for the recovery of money only, there shall be indorsed (2) on the writ the amount to be stated in the precipe, for which, with interest, judgment will be taken if the defendant fail to answer; and if the defendant fail to appear, judgment shall not be rendered for a larger amount, and the costs. [51 v. 57, § 57; S. & C. 961.]

1. Or deputy, 15 O. 288. Clerk is not bound to issue summons without a precipe, 6 O. 150. 2. 25 O. S. 82; 31 O. S. 87; 8 Bull 111; whether the action sounds in contract or tort, 31 O. S. 87; but not in an action for the sale of mortgaged premises and for a personal judgment. No indorsement of any kind is necessary, 31 O. S. 499, and the absence of an indorsement in such case does not render the proceeding erroneous, though the court on default renders a decree for the sale of the mortgaged property, but no personal judgment, 26 O. S. 644. Judgment by default can not be taken against the defendant who has not otherwise appeared in an action for the recovery of money only, where the summons served has no indorsement upon it of the amount claimed, 25 O. S. 82. A recital in the writ of the amount, without an indorsement, not sufficient, 40 O. S. 603 (action before justice).

Personal judgment can not be rendered on cross-petition without summons, when defendant against whom cross-petition is filed is in default for answer, 3 C. C. 144; see 2 Bull 266. Amount indorsed limits judgment, see 1 Bull 186.

§ 5038. When summons may issue to other counties. When the action is rightly brought in any county according to the provisions of chapter five of this division, a summons may be issued to any other county, against one or more of the defendants, at the plaintiff's request; but no maker or acceptor, or, if the bill is not accepted, no drawer, of an instrument for the payment of money only, shall be held liable in an action thereon, except on warrant of attorney, in any county other than [the] one in which he, or one of the joint makers, acceptors, or drawers, resides or is summoned. [68 v. 77, § 58.]

An action to enforce the statutory liability of stockholders is not rightly brought, within the meaning of this section, when none of the defendants reside or could be summoned here, although one of them indorsed upon the summons issued for him to the sheriff of this county and mailed to him by plaintiff's attorney at his residence in another county his acceptance of service and entry of appearance, 10 Bull 413 (C. S. C.) A non-resident of the county served out of the county with summons in a case brought on three causes of action, one of which is against said non-resident jointly with the resident of the county, and the other two are against such non-resident alone, can on motion enter his appearance as to such two causes of action solely for the purposes of the motion, have the said two causes of action stricken from the petition, and be dismissed from the cause as to them, 11 Bull 199 (C. P.) Service of summons on party decoyed into county or brought into state by requisition set aside, 6 Rec. 464; 7 Id. 212; 40 O. S. 130; see 19 Bull 269; 4 C. C. 242; § 5031*n*; 51 O. S. 97; 8 C. C. 616.

§ 5039. When summons returnable. When the time for bringing parties into court is not fixed by statute, the summons shall be returnable on the second Monday after its date; but when it is issued to any other county, it may be made returnable, at the option of the party having it issued, on the third or fourth Monday after its date; and the day of the month on which it is returnable shall be stated therein. [51 v. 57, § 59; S. & C. 962.]

18 Kas. 114; 21 Kas. 475. The statute is mandatory. No discretion is vested in the clerk in respect to return or answer days, 8 Neb. 218; see 34 O. S. 124; 1 W. L. M. 567.

§ 5040. Alias writs. When a writ is returned "not summoned," other writs may be issued, until the defendant is summoned; and when defendants reside in different counties, writs may be issued to such counties at the same time. [51 v. 57, § 60; S. & C. 962.]

The service of an *alias* summons within the life of a prior summons is not void or voidable when at the time it was issued

and served the prior summons was not in the hands of the officer nor under his control, 28 O. S. 451.

§ 5041. Who may serve summons. The summons shall be served by the officer to whom it is directed, who shall indorse on the original writ the time and manner of service (1), or it may be served by any person not a party to the action, appointed by such officer; but the authority of such person shall be indorsed on the writ (2); and when the writ is served by a person appointed by the officer to whom it is directed, or when the service is made out of the state, the return shall be verified by oath (3). [51 v. 57, § 61; S. & C. 962.]

1. 3 W. L. M. 214. The return of the officer is conclusive between parties and privies as to all things the law authorizes or requires him to do officially, 14 O. S. 240. Affidavit of deputy sheriff that he believed he served summons in error insufficient, 40 O. S. 231. 2. Without such indorsement of authority, there is no such service as will charge third persons with notice of the pendency of an action, as provided in § 5055, 30 O. S. 344. Presumption after judgment where service is made by unauthorized person, 9 Neb. 94. 3. 31 O. S. 646.

§ 5042. Manner of service and return. The service shall be by delivering, at any time before the return lay (1), a copy of the summons, with the indorsements thereon (2), to the defendant personally (3), or by leaving a copy at his usual place of residence (4), or, if the defendant is a partnership sued by its company name, by leaving a copy at its usual place of doing business (5), and the return must be made at the time mentioned in the writ, and the time and manner of service shall be stated on the writ. [51 v. 57, §§ 62, 63, 64; 76 v. 15, § 1; S. & C. 962, 963.]

See §§ 5011, 5381. 1. Service of summons on the return day is not void, but voidable, 17 O. S. 225; 1 Neb. 432; and the objection that summons was served on the return day and not returned until two days thereafter is waived by filing an answer, 7 O. S. 309. 2. 2 W. L. M. 588; see 3 Id. 214. 3. Return showing service by "reading" insufficient, 41 O. S. 285 (under justice's act, S. & C. 773); 9 Neb. 504. 4. Leaving copy at defendant's "place of business" is not good service on an individual defendant, 25 O. S. 336; 9 Neb. 504. A return showing that the sheriff left a copy of the summons at the residence of the defendant is sufficient, 15 O. S. 238; and a return "served the same by leaving at each of the within named defendants' . . . usual place of residence a certified copy," etc., is good service upon both husband and wife, 43 O. S. 198; but a return of a summons issued against three defendants "served by leaving a copy of this writ at the residence of the within named defendant," the sheriff having taxed on the writ the fees for serving one person, was held not good service as to all or any, 16 O. S. 371. 5. 18 O. S. 134; 39 O. S. 249; 48 O. S. 665; may be set aside on motion supported by affidavit when served at wrong place; *Id.*; on garnishee.

§§ 5530, 5534; service on one extradited from another state not good, 40 O. S. 130. Attachment against non-resident partnership, 51 O. S. 300; 9 C. C. 283.

§ 5043. What equivalent to service. An acknowledgment on the back of the summons, or petition, by the party sued, or the voluntary appearance of a defendant, is equivalent to service. [51 v. 57, § 65; S. & C. 963.]

A motion denying jurisdiction for insufficient process is not an appearance, 3 W. L. M. 195; nor a motion to set aside summons, 2 C. S. C. R. 30; nor a motion to discharge an attachment, 3 Bull 458; nor to dismiss for want of jurisdiction of person, 89 O. S. 249; nor is an answer denying jurisdiction of the person, 11 O. S. 374; but a motion to vacate a judgment, 25 O. S. 340; 11 O. S. 503, unless based on an alleged want of jurisdiction, 11 O. S. 503, is an appearance; and a motion to strike papers from the files, 29 O. S. 611; to dismiss for want of jurisdiction of subject, 37 O. S. 366; 43 O. S. 171. Filing a bill of particulars in an action before a justice of the peace is an appearance, 30 O. S. 53; and obtaining leave to answer, 25 O. S. 652; and giving bail for stay of execution, 36 O. S. 215; and an appearance to give notice of an appeal, 13 O. S. 563; and filing a demurrer, 2 H. 74; 7 O. S. 233. Process against, and service on, husband, in an action to foreclose a mortgage executed by husband and wife, does not effect her appearance, 15 O. S. 485. It is not proper practice for the attorney of plaintiff to acknowledge service of process for the defendant, 1 H. 530. Waiver by appearance of, want of, or defects in process, 15 O. 483, 487, 785; 2 O. S. 287; *quaere* as to appearance of one partner, 18 O. S. 134, 147; filing aff. under, § 550, 2 N. P. S.

§ 5044. Service on corporation. A summons against a corporation may be served upon the president, mayor, chairman or president of the board of directors or trustees, or other chief officer; or, if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof (1); and if such corporation is a railroad company, whether foreign, or created under the laws of this state, and whether the charter thereof prescribes the manner and place, or either, of service of process thereon, the summons may be served upon any regular ticket (2) or freight agent thereof; or, if there is no such agent, then upon any conductor, in any county in this state in which such railroad is located, or through which it passes (3); but if the defendant is an incorporated river transportation company, whether organized under the laws of this or another state, the service of a summons may be upon the master, or other chief officer, of any of its steamboats or other craft, or upon any of its authorized ticket or freight agents, at any port where it transacts business. [65 v. 116, § 66; 76 v. 145, § 10; 51 v. 57, § 66; S. & S. 542.]

See §§ 6477, 6478. 1. When service is made on a subordinate officer, or "by copy left at the office," etc., the return must show that the chief officer could not be found in the first case, and in the second that none of the specified officers, chief or subordinate, could be found in the county, 13 O. S. 563; 25 Bull 875. In case of a dissolved corporation, service on the members of the last acting board of directors is sufficient, 20 O. S. 190. 2. 1 C. C. R. 112, 115; but service on a ticket agent, appointed by the receiver of the company, is not good, 1 C. C. R. 511; nor is service upon a traveling solicitor of the company, 16 Bull 6. 3. It is not necessary, to give the court jurisdiction, that the line passing through the county should be absolutely owned by the defendant railroad company; a title by lease and user of it as a railroad is sufficient, 1 C. C. R. 115. When officer, etc., is non-resident, § 5052a.

§ 5045. On insurance company. When the defendant is an insurance company, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency. [51 v. 57, § 67; S. & C. 963.]

37 O. S. 366.

§ 5046. On foreign corporation. When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent. [51 v. 57, § 68; S. & C. 963.]

17 O. S. 641; 1 C. S. C. R. 311; 2 Id. 75; 1 H. 571; 9 Bull 198; 87 O. S. 366.

§ 5047. How infants served. When the defendant is under the age of fourteen years, the service must be upon him, and also upon his guardian, or his father; or, if neither his guardian nor his father can be found, then upon his mother, or the person having the care of such infant, or with whom he lives; if neither of these can be found, or if the defendant is a minor over fourteen years of age, service upon the defendant alone shall be sufficient; and the manner of service may be the same as in the case of adults. [51 v. 57, § 69; S. & C. 963.]

It is irregular to proceed against an infant, until the process has been served strictly in accordance with this section, 1 H. 287. The summons should properly show, as a guide to the sheriff, the age of each infant as stated in the petition, Id.; 2 Law Gaz. 404. The return of the sheriff, that he has served process on the infant alone, is insufficient, unless accompanied with a statement that there could be found no guardian or father, no mother, or person having the care of the infant or with whom he lived, or that the minor is over fourteen years of age, 1 H. 287.

SUBDIVISION II. CONSTRUCTIVE SERVICE.

§ 5048. When service by publication may be made. Service may be had by publication in either of the following cases:

1. In actions under the first three sections of the last chapter, when the defendant resides out of the state, or his residence can not be ascertained.

2. In actions to establish or set aside a will, and in actions authorized by § 6202 R. S., when a defendant resides out of the state, or his residence can not be ascertained.

3. In actions in which it is sought by a provisional remedy to take, or appropriate in any way, the property of the defendant, when the defendant is a foreign corporation, or a non-resident of this state, or the defendant's place of residence is unknown, and in actions against a corporation incorporated under the laws of this state, which has failed to elect officers, or to appoint an agent, upon whom service of summons can be made, as provided by section five thousand and forty-four, and which has no place of doing business in this state.

4. In actions which relate to, or the subject of which is, real or personal property in this state, when a defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the state, or a foreign corporation, or his place of residence can not be ascertained.

5. In actions against executors, administrators, or guardians, when the defendant has given bond as such in this state, but at the time of the commencement of the action is a non-resident of the state, or his place of residence can not be ascertained.

6. In actions where the defendant, being a resident of this state, has departed from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of summons, or keeps himself concealed with like intent.

7. When a defendant in a petition in error has no attorney of record in this state, and is a non-resident of and absent from the same, or has left the same to avoid the service of summons in error, or so conceals himself that such process can not be served upon him.

8. In an action or proceeding under chapter six, division four, of this title, or to impeach a judgment or order for fraud, or to obtain an order of satisfaction thereof, when a defendant is a non-resident of the state.

In any such case, when the residence of a defendant is known, it must be stated in the publication; immediately after the first publication, the party making the service shall deliver to the clerk copies of the publication, with the proper postage, and the clerk shall mail a copy to each defendant, directed to his residence named therein, and make an entry thereof on the appearance docket; and in all other cases, the party who makes the service, his agent or attorney, shall, before the hearing, make and file an affidavit that the residence of the defendant is unknown, and can not, with reasonable diligence, be ascertained. [87 v. 225.]

1. See §§ 5022, 5023, 5024.

2. See §§ 5858-5866.

3. A non-resident must have property or debts owing to him within the state, 28 O. S. 451; 21 O. S. 221. In actions where property is attached and summons returned "not served," no time is fixed within which service by publication must be made, 41 O. S. 271. In actions against unincorporated companies by name, service by publication can not be made, 39 O. S. 249. A foreign dissolved corporation may be served with process by publication the same as if not dissolved, 2 H. 1; see 2 C. C. R. 110.

4. In an action to foreclose a mortgage, personal judgment can not be rendered against a non-resident defendant served by publication, 21 O. S. 142; nor in an action against a non-resident married woman contracting as surety for her husband, 50 O. S. 417.

6. See § 5021.

8. §§ 5854-5865.

Insane person may be brought into court by publication, 1 O. S. 544. Finding that notice had been given non-resident defendant by publication not collaterally impeachable, 15 O. 447, 466; 2 O. S. 270; impeachable on review, 13 O. S. 431, 439. Finding that notice was given by publication equivalent to notice, record failing to show it, 35 O. S. 394. Mistake in notice by publication does not vitiate attachment properly issued and levied, 2 C. C. 110. There is no provision of the statute which makes the memorandum of the clerk exclusive evidence of the mailing of copies, 6 C. C. 554. Foreclosure, affidavit, 51 O. S. 421.

§ 5049. Affidavit before service by publication. Before service by publication can be made, an affidavit must be filed that service of a summons can not be made within this state, on the defendant to be served by publication, and that the case is one of those mentioned in the preceding section; and when such affidavit is filed, the party may proceed to make service by publication. [51 v. 57, § 71; S. & C. 964.]

2 H. 1; 9 Kas. 390; 21 Kas. 124; 23 Kas. 138. When no affidavit is filed there is no valid service, 7 Neb. 152. The affidavit is jurisdictional, and unless it conform substantially to the statute, and set forth the necessary facts to authorize the service, the court does not acquire jurisdiction, 9 Neb. 202; 10 Neb. 113.

Where the service is void defendant is not concluded by the recitals in the decree from showing want of jurisdiction, 10 Neb. 114. Failure to file, renders subsequent proceedings void, 33 O. S. 254, 268.

§ 5050. How publication made. The publication must be made for six consecutive weeks, in a newspaper printed in the county where the petition is filed; or, if there is no newspaper printed in the county, then in a newspaper printed in this state, and of general circulation in such county; if it be made in a daily newspaper, one insertion a week shall be sufficient; and it must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer. [51 v. 57, § 72; 62 v. 66.]

Six consecutive weeks, 1 Bull. 109. Mistake in notice, 2 C. C. R. 110. Approval of service by publication by the court is not required by the code, 2 H. 1. 8. A finding that notice has been given non-resident defendants by publication according to law can not be collaterally impeached, 2 O. S. 270; 8 O. S. 586, but is not conclusive upon bill of review, 13 O. S. 431, 439. Sufficiency of, 16 O. 66; description of attached property unnecessary, 40 O. S. 636.

§ 5051. When service complete, and how proved. Service by publication shall be deemed complete at the date of the last publication (1), when made in the manner and for the time prescribed in the preceding sections; and such service shall be proved by affidavit (2). [51 v. 57, § 73; S. & C. 964.]

1. 40 O. S. 636. 2. A copy of the published notice, with the affidavit of one of the publishers that it was inserted and published in the paper as required by the order of publication, is sufficient, 17 O. 27.

§ 5052. Personal service out of the state. When service may be made by publication, personal service of a copy of the summons and petition may be made out of the state. [51 v. 57, § 74; S. & C. 965.]

Such service can not be made upon a non-resident in an action to recover a judgment for money only to be enforced by execution, 28 O. S. 451; and where the action is for the conveyance of lands without the state, such service will not confer jurisdiction over the person served, 14 O. S. 302. An affidavit made out of the state verifying the return of such service of a summons must be made before a person authorized by the code to take depositions, 31 O. S. 646, §§ 5269, 5270.

§ 5052a. Service of summons; how made, when officer, agent, or director is a non-resident. Whenever it shall be made to appear to the satisfaction of any court of

record in this state, in any action now pending, or hereafter to be brought therein, that any one named as a party defendant is a corporation organized under the laws of the state of Ohio, owning or otherwise interested in real or personal property within the jurisdiction of such court, is a proper party therein, and that there is no officer, agent, or director of such corporation within the state of Ohio upon whom service of summons in said action can be made, it shall be lawful for said court to authorize any person residing in or out of the state to make service of summons on such corporation by delivering to the last known president, or other chief officer or director of such corporation, a copy of the summons therein, and the person making such service shall make affidavit thereto, and forthwith make return to the clerk. That whenever service of summons shall have been so made, the said service shall have the same effect, and shall be taken and held as if made upon said corporation in this state by personal service of such summons upon the proper officer, agent, or director of such corporation upon whom a service of summons is now authorized by law to be made in other cases. [86 v. 172.]

§ 5053. Service upon unknown heirs. When an heir or a devisee of a deceased person is a necessary party, and it appears by affidavit that his name and residence are unknown to the plaintiff, proceedings against him may be had without naming him; and the court, or a judge thereof, shall make an order respecting the publication of notice, but the order shall require not less than six weeks' publication. [79 v. 26; 51 v. 57, § 76; S. & C. 965.]

10 O. 275; 35 O. S. 387. See notes to § 5048.

§ 5054. Procedure when defendants are not all served. When service has been made on one or more defendants, but not on all, the plaintiff may proceed as follows:

1. If the action is against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise direct.

2. If the action is against defendants severally liable, he may, without prejudice to his rights against those not served, proceed against the defendants served. [51 v. 57, § 77; S. & C. 965.]

This section authorizes a judgment against such joint con-

tractors as have been "served" with summons in the action in those cases only where the action was commenced by the filing of a petition and the issuing of summons against all of the joint contractors, 31 O. S. 572. Where a joint judgment is rendered against several defendants, part of whom only were served with process, such judgment is void as against those not served, and voidable as against those served, 29 O. S. 617, citing 16 O. 271; 21 O. S. 181; but where the liability is several the judgment is void as to those not served and valid as to those served, 31 O. S. 499. Where a joint suit against all the obligors in a bond is the only remedy of the plaintiff, it is error to render a several judgment against one, leaving the action to proceed as to the others, 23 O. S. 543. A judgment rendered by a justice of the peace upon a joint note against one of the makers, the other having been a non-resident of, and not found within, the county, is no bar to a subsequent action upon such note against the latter, 42 O. S. 11. See 28 O. S. 471.

§ 5055. *Lis pendens*. When the summons (1) has been served or publication (2) made, the action is pending so as to charge third persons with notice of its pendency; and while pending, no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title (3). [51 v. 57, § 78; S. & C. 966.]

1. 26 O. S. 467; 31 O. S. 572; 33 O. S. 523; 3 O. 337; 6 Bull 832; but service of summons by a person appointed by the sheriff for that purpose without indorsing his authority thereon does not charge third persons with notice of the pendency of the action, 30 O. S. 344. 2. 5 O. 461; 17 O. S. 225. 3. Action abated by death of one of the parties no longer a *lis pendens* until revivor, 14 O. 109. Appearance effected by obtaining leave to answer sufficient to charge third persons with notice, 25 O. S. 652. Doctrine does not apply to negotiable paper, 11 O. S. 252; or stock, 21 Bull 318; to parties in interest not parties to the action, 17 O. 226; 14 O. 109; 18 O. S. 546; to proceedings in alimony, 7 O. (Pt. 1), 161; unless real estate is described, 30 O. S. 579; where the object of the suit is to recover specifically real estate or to affect title, 7 O. (Pt. 1), 161, 164. Conveyance *pendente lite* is good as between the parties, but can not change the right of the litigants, 5 O. 461. Delay of plaintiff does not oust jurisdiction, 41 O. S. 271. Order to debtor in proceedings in aid is *lis pendens*, 6 O. S. 254. Prosecution must be close and continuous, 14 O. 109; 28 O. S. 181. Purchaser of subject matter of suit acquires no interest as against plaintiff's title, 3 O. 541. Supplemental bill is a continuation of *lis pendens*, 8 O. 203; 10 O. S. 365. Sale under power of attorney pending action to foreclose valid, 17 O. 482. Action to recover personal property not defeated by assignment for creditors, 33 O. S. 523. Probate of will not *lis pendens* as to property of third person devised by it, 40 O. S. 543. When creditor's bill not a *lis pendens* against one who purchased under a superior lien, not questioned in the creditor's suit, 18 O. S. 546.

§ 5056. *Lis pendens* as to suits in other counties. When any part of real property, the subject matter of an action, is situate in any county or counties other than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the

recorders office of such other county or counties, before it shall operate therein as notice so as to charge third persons, as provided in the preceding section; but it shall operate as such notice, without record, in the county where it is rendered; but this section shall not apply to actions or proceedings under any statute which does not require such record. [51 v. 57, § 79; S. & C. 966.]

A mortgagee of real property not part of an entire tract situate in more than one county, will not be charged with constructive notice of an action for the recovery of such property, pending in a county other than that in which the property is situated, 47 O. S. 117. Section does not relate to actions, etc., in U. S. courts, 34 Bull 56.

CHAPTER VII.

PLEADINGS.

SUBDIVISION I.

§ 5057. Forms and rules of pleading. The forms of pleading in civil actions in courts of record, and the rules by which their sufficiency shall be determined, are those prescribed in this chapter. [51 v. 57, § 83; S. & C. 968.]

See § 4971. Pleading must be construed as meaning what is generally understood by ordinary language and hence there can be no established technical mode of stating a cause of action or defense, 8 O. S. 295. The rule of the common law that pleadings are to be construed most strongly against the pleader is abrogated, 14 O. S. 417, 422. That construction will not be given to a pleading which will make it a vain effort to establish the law by averment or to aver a conclusion contrary to law, 22 O. S. 159, 170. When the facts set out in the petition entitle the plaintiff to judgment it is immaterial what the form of the action would have been at law, 21 O. S. 596, 603. The meaning of the pleader must be fairly ascertained from the whole instrument without regard to technical rules. If legal or technical words are used they are to be taken in their recognized sense unless the context shows another sense was intended, 42 O. S. 625. Pleadings must be fairly and reasonably and not strictly construed, 43 O. S. 78. All parts must be construed together, 16 O. S. 118.

§ 5058. Definition of pleadings. The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses; all fictions therein are abolished, and the title of a cause shall not be changed in any of its stages, except when the defendant prosecutes error. [51 v. 57, §§ 82, 115, 116; S. & C. 968, 984.]

§ 5059. What pleadings allowed. The only pleadings allowed are—

1. Petition.

2. Demurrer.

3. Answer, which, when affirmative relief is demanded therein, may be styled cross-petition.

4. Reply. [54 v. 91, § 84; S. & C. 968.]

Cross-petition. A cross-petition may be contained in the answer without any formal designation. An answer with prayer is a cross-petition, 7 O. S. 322; 6 O. S. 207. Plaintiff against whom an answer demanding "affirmative relief" is filed is a defendant to a cross-petition, and has until third Saturday after filing to answer it, 40 O. S. 344. It is not necessary to entitle the defendant to set up in his answer a claim to relief by way of cross-petition that the answer should contain a denial of the allegations of the petition, but it may consist of the statement of purely affirmative matter, 20 O. S. 208. When, upon motion of the defendant, additional parties are brought in as defendants, it is error to grant relief against them on default in favor of the defendant making the motion in the absence of a cross-petition asking relief, 12 O. S. 402. Defendant in error may file a cross-petition asking a reversal of the judgment for errors prejudicial to him, 22 O. S. 516; without leave 35 O. S. 80. When original action and not cross-petition proper remedy, 26 O. S. 652. Demurrer to reply to cross-petition puts in issue the question whether the matter set up in the answer is proper subject of cross-petition, *Id.* Reply to cross-petition may plead set-off, 1 C. S. C. R. 259. Appeal may be had on equitable counter-claim before issue at law disposed of; see 17 O. S. 596; 26 *Id.* 426, 514; 33 *Id.* 16; 30 *Id.* 50. When the issues presented by a cross-petition are complicated and important, the case is a proper one to be docketed as a separate action, 2 D. 286, 296. A motion to a cross-petition separately docketed as a distinct case can only be granted where there is a misjoinder of actions and a demurrer therefor has been granted, 2 Bull. (Sup.) 5. When summons necessary, 10 W. L. J. 162; 3 C. C. R. 144; not for cross-petitioner in error, 40 O. S. 468. Reformation of blank indorsement of note by cross-petition, 46 O. S. 265; generally, 8 C. C. 209.

SUBDIVISION II. PETITION.

§ 5060. *Petition. Contents.* The first pleading on the part of the plaintiff shall be the petition, which must contain:

1. The name of the court and the county in which the action is brought, and the names of the parties, followed by the word "Petition."

2. A statement of the facts constituting the cause of action, in ordinary and concise language.

3. A demand of the relief to which the party supposes himself entitled; if the recovery of money is demanded, the amount shall be stated; and if interest is claimed, the time for which interest is to be computed shall be also stated. [51 v. 57, § 85; S. & C. 969.]

The name of the court and the county in which the action is brought, must be stated, 15 How. Pr. 336; 14 Kas. 101. An omission or defect in this particular should be taken advantage of by motion, 27 Ark. 148; 15 How. Pr. 336; as well as an omission of

the word "petition" in the caption, 1 H. 40. The full names of the plaintiffs and defendants should be given in the title, Bliss Code Pl. § 145; and if given in the title, they need not be repeated in the petition, and may be afterwards referred to as plaintiffs and defendants, 13 Neb. 409; Bliss Code Pl. § 145. The full names of partners must be stated in actions by and against a partnership, Bliss Code Pl. § 145; and where they are given in the title, it is not necessary to repeat them in the petition, 13 Neb. 409. It is not absolutely necessary that the title describe the parties as partners, and give the partnership name, if the facts appear in the body of the petition, though it is the better practice to designate them in the title, Bliss Code Pl. § 145. Where parties sue in a representative capacity, the fact should be stated in the title, or in the body of the petition, 8 N. Y. 472; 11 How. Pr. 11. The representative capacity is designated by the use of the word "as" or its equivalent, 2 Abb. N. C. 238; 62 N. Y. 639. The omission of the word "as" is not, however, conclusive when the representative capacity is disclosed in the body of the petition, 94 N. Y. 302; 73 N. Y. 292. On the other hand, it is held that they must describe themselves in the title and body of the petition as representatives, and must distinctly aver that they are such, or sue in their representative capacity, 10 Kas. 206; 1 W. L. M. 155.

Facts are to be stated positively, 1 D. 159, and not on information or belief, 1 O. S. 504; 13 O. S. 228. An objection to this mode of statement can not be raised by demurrer, 13 O. S. 228; but the defendant may deny in his answer that he has knowledge or information of the facts stated in the petition, 11 O. S. 183; 2 D. 223.

Consistency is required as a rule of pleading. Pleadings, containing inconsistent statements, are construed most strongly against the pleader, 29 O. S. 655; 15 Kas. 41. Only such causes of action can be united as are consistent with each other, 2 D. 584; 97 N. Y. 245. A demand for relief and for a judgment for a specified sum are inconsistent, 10 How. Pr. 445; a claim for conversion and for delivery of the same property, 7 How. Pr. 246; for rent and for use and occupation, 9 Minn. 100. Plaintiff can not seek to affirm a contract and to set it aside, 16 O. S. 129; 2 C. C. 471; nor seek a forfeiture of a lease for non-payment of rent and judgment for rent, 2 D. 574, 585. An election must be made between inconsistent claims, 1 H. 217. The objection is reached by motion, 30 O. S. 600; unless the inconsistency amounts to a misjoinder when demurrer lies, 2 D. 574, 584; but the rule does not require a party seeking to recover upon two grounds, both of which can not be true, but he does not know which one, to stand upon one or the other. He may state them as separate causes of action, and in the alternative, in one petition, 9 Bull 355; 16 Bull, 399. So where a party has one or two defenses, and can not, with certainty, state either one, he has been allowed to state them separately; as where a party, being charged upon a promissory note, answered, first, that he did not sign the note, and, second, that if he did sign it, the signature was obtained by fraud, 29 O. S. 78; or that there was no consideration therefor, and he can not be compelled to elect on which of the two defenses he will proceed to trial, 30 O. S. 600. In an action against a railroad for killing a horse, counting on neglect to keep fences in repair, and negligently running its train, the court overruled a motion to compel plaintiff to elect, saying that the addition of a tort to a separate and distinct act, in violation of a contract, did not deprive the injured party of the right to complain at the

same time of both wrongs, 41 O. S. 233. In an action against a corporation, by the holder of a certificate of stock, issued by the secretary of the corporation, for the repudiation of such certificate, the petition averred, first, that the certificate was genuine and valid, and second, that if the certificate was an overissue it was such by the fraud and neglect of the corporation, and it was held that plaintiff might attempt to sustain either or both of said causes of action, 11 Bull 86; see 10 Bull 142; 1 C. C. 199.

Conclusions of law must not be pleaded, as that an assessment is illegal, 44 O. S. 51; that an act is contrary to statute, 13 Barb. 209; that a contract is void for want of consideration, 58 How. Pr. 426; that plaintiff was compelled to pay a sum of money, 41 Barb. 341; 41 N. Y. 619; that a party is not entitled to a thing, 10 How. 377. Allegations of duty, 31 O. S. 555, of indebtedness, 5 Bosw. 645, of fraud, Bliss Code Pl. § 211, are conclusions of law, but not allegations of negligence, Id; 80 Ky. 84. An allegation that a contract is not binding, or a party not liable, is a conclusion of law, 34 O. S. 450, 467; that defendant was bound by law to fence, 31 O. S. 555; that a note is "not outstanding," 29 O. S. 13, or that it is "not in existence," 82 O. S. 449. "Nothing due thereon" is a conclusion of law, 29 O. S. 13, and that an "injury will be irreparable," 31 O. S. 420. Conclusions of law are not admitted by demurrer, 37 O. S. 402; 33 O. S. 32; nor by failure to deny, 31 O. S. 555; "not authorized by law." legal conclusion, 35 O. S. 201; conclusion of fact, see 1 N. P. 366.

Consideration must be averred in an action on a contract, 37 Barb. 152. This is the general rule, with the exceptions that it need not be alleged in actions on instruments under seal, 13 O. 68; W. 221; upon a promissory note or bill of exchange, 1 O. 115; where the instrument upon which the action is brought purports to be "for value received," 16 O. 1, and in pleading under ‡ 5086; see 12 Bull 100.

Corporate existence, it would seem, must be pleaded, 40 O. S. 517. In 22 O. S. 159, it was said, "our courts will not take notice of the existence of a foreign corporation;" but in 26 O. S. 562, "that the code does not require the title of the plaintiff to sue to be more specifically set out than was required at common law." In 40 O. S. 517, it was said, "the averment, while it was necessary" was waived by going to trial without objection, and was supplied by the allegation in the answer that the defendant below contracted with the plaintiff in its corporate name." The requirements of the N. Y. Code, Civ. Pro. § 1775, are that the petition must aver that the plaintiff is a corporation, whether it is a domestic or foreign corporation, and, if the latter, the state, country, or government by or under whose laws it was created. The courts, it is held, will take notice of the existence of a municipal corporation, 68 Ala. 145, Bliss Code Pl. § 259 (but not whether it is of a certain class, 35 O. S. 319), and of a private corporation created by public act, Bliss Code Pl. § 259.

Damages. Plaintiff can only recover the amount of damages claimed in his petition, 3 Wend. 356; 17 John 111; and, if greater damages are given than claimed, he must remit the excess before he can have judgment, 11 Hun 295. General damages, such as necessarily result from the injury, need not be specially pleaded, 67 N. Y. 267; 82 N. Y. 308; but where damages are the natural consequences of the act, though not necessarily the result of it, they must be specially alleged in the petition, Boone Code Pl. § 18; 12 N. Y. 277; Bliss Code Pl. § 297b; and where they are the foundation of the plaintiff's claim they must be fully stated, 60 How. Pr. 316, as in actions for slander for words not actionable *per se*, 65 Barb. 62; in actions for assault and bat-

tery, 25 Hun 54. In malicious prosecution the amount of costs and counsel fees are elements of special damages, and must be specially pleaded, 7 Daly 74; in actions for injuries to land, loss of rents must be specially pleaded to be recovered, 14 Wend. 159; in actions for damages to baggage by common carrier, loss of employment occasioned by the injury, 2 D. 237, 247; in an action for possession of land, *mesne* profits must be specially pleaded, 12 Barb. 481, and for detention of premises after the expiration of the term, 83 Ind. 387. In trespass *de bonis asportatis* the plaintiff's expenses in recovering possession should be specially averred, 22 Minn. 278; in an action for fraud in selling sheep with a contagious disease, special damages resulting to plaintiff's sheep, and to his pasture into which the contagious sheep were turned, should be averred, 21 O. S. 655; in an action for damages against a railroad for injury, the petition not alleging that expenses for physicians' services were incurred, evidence of the value of such services is not admissible, 1 C. C. R. 37.

Demand, when necessary before bringing suit, must be alleged, 5 O. S. 87, as in an action on a note to charge an indorser, 1 H. 29; 14 Abb. Pr. 215, for detention of personal property, 57 N. Y. 28; 55 N. Y. 671; in an action on an executor's bond by a creditor or distributee under §§ 6210, 6211 R. S. 2 O. S. 574; 5 O. S. 87, when required by the terms of the contract, 27 O. S. 484, and to be made in a particular form, 24 Wend. 256; to fix the liability of sureties, 9 O. 106; 5 O. 444; 16 O. S. 552; of a guarantor, 6 How. Pr. 214; in an action against an attorney for money collected by him, 4 Ala. 493; 18 Ind. 342; 5 Kas. 59; but in an action on a note payable on demand, 24 N. Y. 807; 17 O. 9; 9 O. S. 517; upon a contract to pay money absolutely; 16 N. Y. 451; and against the maker of a note to pay money at a particular place, 48 N. Y. 520, demand is not necessary and need not be pleaded.

Evidence. It is a rule of pleading that evidence must not be stated, 1 W. L. M. 90; Bliss Code Pl. § 206.

Fraud must be specially averred, 44 Barb. 166; 55 Barb. 202. A general charge of fraud is not sufficient, 6 Neb. 192; 1 O. S. 478, 505; 18 Kas. 169; nor is a minute statement of the facts and circumstances constituting the general charge required, 73 N. Y. 571. When the facts constituting the fraud are not clearly known to plaintiff, it is held that they may be stated in the alternative, 2 W. C. Rep. 206.

Knowledge, when constituting the gist of the action, must be specially pleaded, 13 Johns. 339; as in cases of injuries committed by domestic animals, 30 Barb. 147, the owner is not liable unless it is alleged that he had notice or knowledge of their vicious propensities, *Id.*; and where an animal commits an injury while trespassing upon the land of another, 1 N. Y. 515. So in an action of deceit in the sale of goods, *scienter* is necessary to sustain the action, 53 Barb. 425; and in an action for injuries by a servant in the use of defective machinery, knowledge of or notice to the master of its defective condition should be averred, 56 Barb. 151.

Notice. Where the facts lie more properly within the knowledge of one of the parties than the other, notice is requisite, 4 O. 106, and, when necessary, must be specially pleaded, 23 N. H. 471; and if plaintiff relies on facts which excuse notice, he must state them, 4 Sand. 665.

Ownership or title must be alleged, 64 How. Pr. 117; Bliss Code Pl. § 221. In actions affecting realty it is sufficient in this state to allege that plaintiff has the legal estate, § 5781. In actions for the recovery of possession of personal property, plaintiff must allege ownership, general or special. A statement that plaintiff is entitled to possession is not sufficient, 29 Hun 256. A general allegation of ownership is sufficient, as in an action for the conversion of personal property it is sufficient for plaintiff to state that he is the owner, 88 N. Y. 156; in an action by an assignee in bankruptcy to recover the assets, an allegation that he owns the property is a sufficient statement of title, 48 Cal. 439. In an action on a note, it is sufficient to allege that the plaintiff is the lawful or *bona fide* holder and owner thereof, 15 N. Y. 425; 15 How. Pr. 1; 32 Wis. 243; in an action on a note or bill by any one not an original party, he must show the facts which give him title, 32 Mo. 188; 35 Mo. 312; but see § 5086; 32 O. S. 449.

Place. Where the matters pleaded are local in their nature, allegations of place are material and of the substance of the issue, Bliss Code Pl. § 284, as in actions affecting realty, Id. § 285. Actions may be made local by statute, when allegations of place must be specially pleaded, § 5025 R. S.

Representative capacity. The representative capacity in which a party sues should be pleaded; an averment in the caption alone is not sufficient, 20 S. C. 460; 28 How. Pr. 326; 23 Barb. 592. The body of the pleading must show that the party sues in his representative capacity, 94 N. Y. 302, as where plaintiffs sue as executors or administrators, 73 N. Y. 292, or partners, 20 S. C. 460; but if the representative capacity appears in the body of the petition it has been held sufficient though it does not appear in the title, 8 Daly 172. Where one sues as executor or administrator he must aver his appointment and title as such in particular, 61 How. Pr. 494; but an allegation of appointment, without a statement of particulars and qualification, has been held sufficient on demurrer, 27 O. S. 366. The approved way is to allege the death of decedent; that letters of administration upon the estate (or testamentary, as the case may be) were issued to the plaintiff upon a day (named) by the court (named), and that he is still acting as such administrator, or executor, Bliss Code Pl. § 264; but in an action on an instrument given by an executor or administrator as such, it is not necessary to allege the time and manner of his appointment, 58 How. Pr. 1; 61 How. Pr. 494; 18 Hun 375. In case of dissolution of a partnership, by the death of a partner or otherwise, the action must be brought by the survivors, and the pleader will not describe the obligation as given to plaintiffs, but to A, B and C, who composed the firm at the time; and it must be alleged that one of them, as C, has since died, and that they are the surviving members of the firm, Bliss Code Pl. § 265.

Time, when material, should be pleaded, 12 N. Y. 133; but unless it is descriptive of a written instrument of record, W. 430, or is a condition precedent to a right of action, 18 O. 532, allegations concerning it need not generally be pleaded.

Value and quantity. When not descriptive of the subject of the action, allegations of value and quantity need not be proved as alleged, 2 Abb. Pr. 830; 39 Ia. 106.

Prayer for relief. The plaintiff may demand any relief to which he supposes himself entitled, 30 O. S. 374, and may have

any relief to which the facts show he is entitled, 29 O. S. 565. He may unite legal and equitable grounds of relief in the same demand, 21 O. S. 119, when not inconsistent with each other, 16 O. S. 118; and where they are not consistent, he must elect upon which one he will stand, 95 N. Y. 237; and the prayer may, in such case, determine the character of the action, 21 O. S. 277. Plaintiff may pray for alternative relief, 24 O. S. 572; 2 C. S. C. R. 167; 30 O. S. 374; without rendering his pleading open to the objection of inconsistency, 65 How. Pr. 298; 29 Kas. 765. He may pray for reformation of a contract and damages in the same action, 21 O. S. 119, or for an injunction and damages, 31 O. S. 209; and though he pray for the wrong kind of relief, 90 N. Y. 372, or too much or too little, his action will not for that cause be defeated, *Id.* "The rule is now well settled that in actions brought for equitable relief and tried before a judge, though there appears to be no ground for granting such relief, the court should retain the cause and grant such legal relief as may be just," 55 Barb. 482; 35 O. S. 433; 41 O. S. 371. The prayer does not constitute part of the issues to be tried, 33 O. S. 546; 29 Kas. 771; does not of itself and alone determine the character of the action, 25 O. S. 422; its form may be disregarded, 21 O. S. 466; it is not demurrable, 11 Neb. 192, and relief may be had without it, 1 Bull. 91; 5 Rec. 428. The plaintiff can not have a greater amount than he asks for, 31 O. S. 87; and if the verdict is for a greater amount, the excess must be remitted before judgment may be allowed, 6 N. Y. 97; and it is error to render judgment for a greater amount unless the petition has been amended before verdict so as to cover it, 61 Mo. 19.

Petitions in particular cases. Account. See § 5066. A petition which states that there is due to the plaintiff from an unincorporated association a certain sum on an account for articles furnished to said association, as shown by an account attached to the petition, and that the defendant was a member of said association when the debt was contracted and knew of and consented thereto, states a good cause of action against said defendant, 2 C. C. R. 340.

Animals. In an action for injury by dogs to sheep *scienter* need not be averred, 13 O. S. 485 (act 1852), and separate ownership may be charged as joint, 24 O. S. 333 (S. & S. 10). In an action against a railroad company to recover damages for injuries to stock by reason of the neglect of the company to construct and maintain a sufficient fence, an allegation in the petition that defendant was by law bound to fence, etc., is immaterial and not admitted by failure to deny it, 31 O. S. 555.

Assault and battery. Malice may be shown without averring it, 19 O. S. 572, and the permanency of the injury need not be specially pleaded, 37 O. S. 10. Special damages must be averred, 31 Mo. 117, as costs and expenses incurred, *Id.* Attorneys' fees are recoverable as damages, 37 O. S. 10, and physicians' bills, though paid by others, 19 O. S. 569. A cause of action for assault and battery may be joined with one for false imprisonment, 6 Kas. 94. The injury is personal. Several can not unite in the action, Bliss Code Pl. § 26.

Bailment. Demand and refusal must be made and averred to terminate the bailment, 9 Johns. 361; but not in cases of wrongful conversion or loss by gross negligence, 30 Ark. 428; 27 Mo. 549. A tender of the amount due on a pledge must be averred

by a pledgor to recover it against a *bona fide* purchaser without notice from the pledgee, 93 U. S. 321, and a tender of the amount due must be averred in an action to redeem a pledge, 3 Nev. 228.

Bills and notes. It is not necessary to aver consideration in actions on bills and notes. Consideration is imported, 18 O. S. 516. Under § 5086 it is sufficient to set forth a copy of the instrument with the indorsements thereon, and to state that there is due to plaintiff from the adverse party a specified sum with interest; and when others than the makers or acceptors of a bill or note are parties it is necessary to state the facts which fix their liability. A failure to state the amount due under this section renders the petition demurrable, 1 Clev. R. 144, 147. It seems sufficient to attach a copy without incorporating the bill or note in the petition, 4 Bull. 852; 8 Rec. 309; see 27 O. S. 421, 425. The extrinsic facts which show the plaintiff's right or title need not be expressly averred. The allegation of title is implied by force of the statute in the statement that there is due to him a specified amount on the note which he claims, Swan's Pl. & Pr. 186; 32 O. S. 449; 5 Bull. 793. It is not sufficient to give a copy of the note in an action by one other than the payee against the maker; he must give a copy of the note with the indorsements to entitle him to the protection given to a *bona fide* indorsee for value and before maturity, 31 O. S. 193. In an action against the maker of a note or acceptor of a bill of exchange in which a place is fixed for payment it is not necessary to aver presentment at that place and refusal to pay, 11 Cal. 307; 9 W. Va. 373; nor is an averment of demand necessary on a note payable on demand, 9 O. S. 517; 17 O. 9; but in an action against an indorser presentment and demand of payment at the place specified is necessary to charge him, 5 How. Pr. 107. An averment that the note was presented to the maker at maturity for payment and payment thereof demanded, and the same was not paid, of all of which the indorser had due notice, is a sufficient averment of presentment, refusal, and notice, 63 Cal. 302; see 1 H. 29; 2 W. L. Gaz. 388; or that at the maturity of the note the maker could not be found after due diligence and inquiry, and that it was not paid, of all of which the indorser had due notice, Bates Pl. 310; and where the indorser has sufficient effects of the maker to indemnify him against payment of the note the petition should aver that no demand was made on the maker, or notice of payment or non-payment given to the indorser, because at the maturity of the note the indorser had sufficient effects of the maker in his possession to indemnify him against payment, Id.; 32 O. S. 29; 33 O. S. 295. The destruction or loss of a note need not be averred if a copy is given in the pleading, 32 O. S. 449. Title, how averred, 8 Bull. 281; see 41 O. S. 62.

Bond. In averring the execution of a bond the statute need not be set forth, W. 722; and when pleaded the words of the statute need not be followed, 25 O. S. 567. An averment of approval is not necessary, 17 Minn. 451; see 22 O. S. 527; Id. 317, 320. Stating that it was executed pursuant to an order of court filed with the clerk, and that thereupon the order secured by it issued, is a sufficient averment of approval on general demurrer, 1 O. S. 190, 196; 9 O. S. 17, 24. No consideration need be averred in actions on statutory bonds, though not under seal, 62 Barb. 175; 8 C. 12 Abb. Pr. N. S. 324. Where an undertaking is given in pursuance of a statute, and no demand is required by the

terms of the instrument, no such averment is necessary in the petition in an action upon the undertaking, 40 Abb. Pr. 22; but if the condition of a bond is to pay on demand, a demand must be averred, 5 Hill 143; 15 Q. B. 418; and a demand or an excuse for the want of it is necessary in an action on the bond of an officer for withholding moneys, 5 O. S. 87, 90. Matter constituting a breach must be pointed out, 6 O. 150. It is, however, a sufficient allegation of a breach as against a demurrer to set forth the condition alleged to have been broken and aver its non-performance, 27 O. S. 366; but if the condition requires a compliance with the terms of another obligation not fully stated in the condition, the pleading must set out such obligation with the corresponding breach, 17 O. 436. In an action on a bond of indemnity, conditioned that the principal obligor shall pay any judgment recovered against the obligee, the measure of the recovery is the amount of the judgment, and it is not necessary to aver or prove payment of the judgment by the obligee prior to the beginning of the action, 42 O. S. 508. In an action on a sheriff's bond for failure to levy an execution on chattels it must be averred that the chattels were within the bailiwick and might have been seized, 88 Ind. 587. Admr's. bond, 44 O. S. 637.

Breach of promise of marriage. The petition must allege that the promise was mutual, 12 How. Pr. 504, and that plaintiff was ready and willing to fulfill the contract, 64 Ind. 567. Plaintiff need not aver a tender—a readiness is sufficient, 2 W. L. M. 96 (except in case of a male plaintiff, Id.); but if the promise was to marry on a day named the petition need not aver a request for performance, 84 Ind. 3, 6; nor where the defendant has renounced his promise, 42 N. Y. 246; 76 Ind. 594; L. R. 7 Ex. 111 (when a right of action arises immediately thereon, though the time fixed for the performance has not passed, Id.; see 33 O. S. 147, 149); nor where the petition avers a marriage of the defendant to another, 15 M. & W. 189. In averring the marriage of the defendant to another it is not necessary to aver that such other is still living, 8 Q. B. 358; and when the defendant represented himself to be unmarried it is not necessary to aver that he knew his representations to be false, 29 Barb. 222; 7 Abb. Pr. 403. Special damages must be averred to be recovered, 13 Barb. 183, as loss of health, Id.; seduction by means of the promise, 76 Ind. 594; 37 Wis. 46; see 11 O. S. 330; disappointment of reasonable expectations, injury to feelings and affections, etc., 13 Allen 145; 102 Mass. 399; though loss of time and expenses in preparation for the marriage need not be specially averred, 4 Cush. 408. Infancy is a good defense, 31 O. S. 621; but where a promise was alleged to have been made at a certain time, to which the defendant pleaded infancy, it was held not error for the court to permit an amended petition to be filed stating other promises and a ratification of the first promise after the defendant became of age, 16 Neb. 510; see as to evidence and damages, 3 C. C. 305. No action will lie when parties are related as first cousins, 29 Bull. 48; 49 O. S. 654.

Common carrier. An averment that defendant, a common carrier, accepted the plaintiff as a passenger, conveys an implied agreement that the plaintiff will pay the fare and that the carrier will carry him safely, and no averment to that effect is necessary, 68 Mo. 340. A petition alleging that defendants were common carriers by omnibus or stage, and that they undertook to carry the plaintiff for hire, was held to be sufficient without alleging that they received compensation from

other passengers, 58 N. Y. 613. In an action against a carrier of passengers to recover damages for refusal to carry the plaintiff, it is not necessary to allege a tender of fare. It is sufficient to allege that plaintiff was ready and willing to pay the defendant such sum as it was legally entitled to charge, 34 Cal. 616. A petition under an act prescribing a penalty for charging excessive fare is not bad for want of an averment that the purchaser of the ticket was in fact transported on the ticket for which excessive fare was exacted, nor that the excessive fare was paid by the plaintiff in the due course of business, 37 O. S. 265. A petition in an action by a passenger for carrying him past a station must aver that the train should have stopped at such station, or that by a special contract the company had agreed to carry him to that station and let him off there, 67 Ind. 12. In charging a common carrier with loss or injury to goods delivered to it for transportation, it must be averred that defendant is a common carrier, 9 Barb. 158; that the goods were delivered to it, 10 Ala. 221; and that it accepted and undertook to carry them, 1 Port. 107. A petition which alleges a delivery of the goods by the owner to the carrier, and their acceptance by such carrier, to be carried from one place to another for reward, the loss of such goods, and that the loss was occasioned by the negligence of the carrier, stating the value of the goods and the damage to the plaintiff, states a good cause of action, 10 Minn. 418. Where the petition avers a general contract and the proof shows a special contract, the variance is fatal and plaintiff can not recover, 90 Ind. 459; 28 O. S. 418. Where the carrier claims exemptions from its common law liability under a bill of lading not signed by the owner or consignor, it must aver and prove that such bill was assented to by the shipper, 28 O. S. 418. Plaintiff may sue on the contract or in tort, 31 O. S. 537, 542, 543. The real owner or one with whom the contract is made may sue on the contract, but only the former in tort, Bates Pl. 372. When a passenger sues for exemplary damages, he must sue in tort and not on the contract, *Id.* In tort against a carrier it is not necessary to allege that compensation was paid or agreed to be paid for carrying goods, 36 N. H. 26; and when a carrier's liability is restricted by special contract, when sued in tort, the special contract need not be noticed, 64 Mo. 440. see 2 C. C. 504.

Contract. The petition should allege its execution, breach, and damages for which plaintiff asks judgment, 38 Ind. 175. The circumstances attending the contract and its execution need not be set forth, 66 N. Y. 214; but the facts constituting the breach must be pleaded, 62 Ind. 259. In pleading an account or instrument for the unconditional payment of money, see § 5086. In an action for money due upon a contract, the petition must show that the claim or sum of money is due and unpaid, 87 Ind. 126. Damages for breach, see 35 Bull 129.

Conversion. The petition should aver plaintiff's ownership, the value of the property and that defendant converted it to his own use, 28 Bull 318; 49 O. S. It is not necessary to aver demand and refusal to deliver, *Id.*, nor the particular acts constituting the conversion, 63 How. Pr. 471. A petition by a guardian alleging that "his wards were owners in fee simple of a certain woodland, that the timber thereon was cut down and removed by a person unknown and without any authority whatever, and that the same was taken and possessed for its own use, and without any authority whatever, by a certain railroad company,

which company was afterwards consolidated with another railroad company," constitutes a good cause of action for the conversion of personal property, 37 O. S. 282. It is sufficient to allege ownership generally without stating the facts showing plaintiff's title, 64 How. Pr. 117; 77 N. Y. 158; and ownership must be alleged as of the time of the conversion, 31 Minn. 119; but if forcible and wrongful taking from plaintiff's possession is set forth, ownership need not be alleged, 6 Bosw. 154. An allegation of actual possession in the plaintiff and wrongful detention from him is sufficient, 11 How. Pr. 11. While it is usual to allege the value of property converted, see 2 E. D. Smith 314, a failure to do so will be cured by a verdict for the plaintiff, 31 Ark. 286. Demand and refusal should be alleged where the defendant has come rightfully into possession, W. 337; but where the *bona fide* buyer has sold and delivered the goods demand by the owner is not necessary to a suit for the conversion, 61 N. Y. 477. The property should be described with reasonable certainty, 23 N. H. 555. The measure of damages is the value of the property at the time of its conversion, with interest, 7 O. S. 299, 308; for conversion of notes, their face value, but the amount may be reduced by showing insolvency, 16 O. S. 382. An innocent purchaser of timber is only liable for its value before cut, 32 O. S. 71; 37 Id. 282, though the title was held under a decree of court which was subsequently reversed, 1 C. C. R. 155. The owner may waive the tort and sue on the implied contract, 49 Mo. 570; but to sue for money had and received in such case, plaintiff must allege and show that the goods have been disposed of by the wrong-doer for value, 7 Hun 525; 31 Ark. 155; contra, 66 Barb. 353.

Covenant. Eviction under a better title or something equivalent is necessary, and must be alleged in an action on a covenant of warranty, 17 O. 66; 2 H. 86, 93; 10 O. 382. Where a breach of warranty is set up as a counter-claim under § 5780, in actions for the recovery of purchase money, the person claiming a paramount title must be made a party, but if he is in possession he can not be compelled to litigate in the action, 35 O. S. 289. Such counter-claim can only be set up where there has been a breach, 28 O. S. 39. In an action on a covenant against incumbrances, the incumbrances relied on should be averred, 11 Johns. 6. An eviction need not be averred or proved in such action, 23 O. S. 584. Payment to free premises from dower is not sufficient. It must be averred that dower has been set off, 17 O. 71. In an action on a covenant of seizin, eviction must be averred. Negating the covenant or the legal seizin at the date of the covenant does not aver a breach, 23 O. S. 584, 588; 31 O. S. 574. Answer, see 3 C. C. R. 177. *Criminal assault*, 10 C. C. 291.

Death by negligence. While the action can not be maintained for a death occurring outside of Ohio, 2 C. S. C. R. 82, the petition need not aver that it occurred in Ohio, Id.; 2 H. 110; 25 O. S. 667; nor set forth the injury to the widow or next of kin, 7 O. S. 336; but to recover damages for injury to the business of deceased, a special averment is necessary, 10 Rec. 444; 2 W. L. G. 1; see 7 O. S. 336, 340; 15 O. S. 553; 2 W. L. M. 593; 1 D. 257. The action is in form *ex delicto* and barred in four years from the time the cause of action accrued. The foundation of the action is the injury and not the death alone, and the cause of action accrues at the time the injury is received, 2 C. C. R. 45. The action may

be brought on behalf of a bastard, 10 O. S. 272; and for the benefit of the next of kin, who had no claim for support upon deceased, 25 O. S. 510. But a recovery can not be had in the name of the beneficiaries, 25 O. S. 522. Causing death by intoxication is not within the statute, 31 O. S. 359; 35 O. S. 389.

Deceit. The petition must allege that defendant intended to deceive plaintiff, 26 O. S. 423; 15 O. 659; that the representations were made to plaintiff, or to his agent, 16 O. S. 67; cf. 15 O. 659; that plaintiff relied on the representations and was deceived by them, 40 Ind. 90; and that the injury arose by the misrepresentations, 6 O. 497.

Executor and administrator. See Representative Capacity, *supra*. In an action by an executor or administrator, he must aver his appointment, 1 W. L. M. 155; but it is not necessary to state the particulars of his appointment or qualification, 27 O. S. 366 (§ 6214); nor to make profert of letters testamentary, 1 W. L. M. 155; and where an executor or administrator sues on a note or contract, made with him as such, he need not allege his appointment, 33 Barb. 27; and in an action against an executor, upon an instrument executed by him as such executor, it is sufficient to allege that fact without setting forth the particulars of his appointment, 61 How. Pr. 494. Under § 6166, when a petition is filed for the sale of an equitable estate, or any equitable interest which the deceased held in any lands, the executor or administrator shall set forth in the petition the nature of such equitable estate or interest, making all necessary parties, including the persons holding the legal title thereto and those who are entitled to the purchase money therefor. Under § 6141, a petition by an executor or administrator to sell lands to pay debts must set forth the amount of debts due from the deceased, as nearly as they can be ascertained, and the amount of the charges of administration, the value of the personal estate and effects and a description of the real estate, and the value thereof, if appraised. Under § 6108, an executor or administrator of deceased is not liable to the suit of a creditor until after the lapse of eighteen months from the date of his administration bond, or the further time allowed by the court for the collection of the assets of the estate, unless it be for the recovery of a demand that would not be affected by the insolvency of the estate, or unless it be brought after the estate has been represented insolvent for the purpose of ascertaining a claim that is contested; or unless the claim has been exhibited to the executor or administrator, and has been disputed or rejected by him. A petition in an action against an executor or administrator under this section must aver the lapse of eighteen months, etc., or that the claim was within the exceptions, 3 W. L. M. 134; 2 C. S. C. R. 144. §§ 6210, 6211, provide for actions by creditors' legatees, distributees, etc., on administration bonds, on failure on demand of personal representatives to pay their claims against the estate. Under these statutes the petition must allege plaintiff's right to a sum liquidated by allowance, judgment, order, or award, 28 O. S. 175. § 6214, providing for an action on an executor's bond by an administrator *de bonis non*, does not require that such administrator obtain leave to sue, 27 O. S. 366, 369; and on demurrer the petition is sufficient if it alleges his appointment by the proper authority without averring that he had given bond, *Id.*; and it is sufficient to set forth the con-

dition of the bond alleged to have been broken, and to aver non-performance of such condition, *Id.* When the action is against the surviving obligors and the administrator of a deceased obligor, the petition must aver the lapse of eighteen months, unless the case comes within the exceptions provided in § 6108, 12 O. S. 252. When the action is by a creditor on an administration bond, the petition must aver a demand or an excuse for its omission, 17 O. 161; but when it is against an executor upon a bond given by him as residuary legatee for the payment of debts and legacies, the petition need not show a presentment of the claim for allowance or rejection, 13 O. S. 525 (act 1840).

False imprisonment. The petition must aver that the defendant imprisoned the plaintiff against his will and without authority of law, 15 How. Pr. 261. Want of probable cause need not be averred, 14 O. S. 213; 37 O. S. 473; nor that the acts were illegal, wrongful, or without competent authority, 39 Ind. 323. An action for false imprisonment may be changed by amendment into one for malicious prosecution, 3 Bull 1189, and *vice versa*, 14 O. S. 218, and a cause of action for false imprisonment may be joined with one for malicious prosecution when they arise out of the same transaction, 93 N. Y. 515.

Fraudulent conveyance. In an action to set aside a fraudulent conveyance, the petition must aver that the conveyance was made with intent to hinder, delay, or defraud creditors, 30 O. S. 11; 1 O. S. 1; 9 O. S. 380; and must describe the property with such definiteness as to enable it to be identified, 2 Wall. 237. Where the petition shows that the conveyance was made more than four years prior to the action, it must be averred that the fraud was not discovered within that period, 32 O. S. 228; 2 C. S. C. R. 523. But the petition need not aver that there is no other property out of which to make the claim by execution, 29 O. S. 597; 25 O. S. 500; nor that the creditor has reduced his claim to judgment, 32 O. S. 228; 2 C. S. C. R. 523. When it appears from plaintiff's petition in an action for relief on the ground of fraud that the cause of action accrued more than four years before the action was commenced, a general averment in the petition that the fraud was not discovered by plaintiff until a time within four years before the action was brought is sufficient to bring the case within the saving clause of the statute of limitations for such actions, without specifically setting out when the discovery was made or how it was made or why it was not made sooner, 29 Bull 391; 50 O. S. An action is deemed commenced at the time of the summons which is served on the defendant and although a demurer is sustained to the petition and leave given to amend, the action remains "commenced," and the averment as to the discovery of the fraud within four years before the action was brought may be supplied in a subsequent amendment to the petition. *Id.*

Guaranty. A guarantor of a note is entitled to notice, 2 O. 430, but an absolute guaranty requires no notice, and no averment of demand and notice is requisite to make a *prima facie* case for recovery upon it, 19 O. S. 549; and notice is not required where the letter of credit binds the writer to pay, 12 O. S. 273. The guarantor of the collectibility of a note requires notice, 4 O. S. 263; but demand and notice at the maturity of the note need not be averred, 14 O. S. 246. In an action on a guaranty of payment or collection of a debt, it is not necessary to aver that the promise was in writing, 29 Cal. 597. It will be presumed to have been made in writing until the contrary appears by the

answer, 2 Minn. 277. In an action on a guaranty of prompt payment it is not sufficient to state that the principal debtor has not paid without stating that the defendant, the guarantor, has not paid, 50 Cal. 520. When notice of the acceptance of an offer of guaranty is requisite, an allegation of notice in the petition in an action on such guaranty should be specific, and such as will enable the court to determine from its statements whether or not the notice was given as the law requires, 4 Met. (Ky.) 147; a general averment "of all of which defendant had notice" is not sufficient, Id. In an action on a conditional guaranty, the petition must show that the condition has happened which made the defendant liable, 60 Cal. 235.

Inn-keeper. The petition must allege that the plaintiff is a guest and was entertained by defendants as inn-keepers for compensation, 2 C. S. C. R. 58. In an action to recover for loss of goods, it is not necessary to aver a demand before action, nor to aver negligence, 2 E. D. Smith 148. But in pleading under § 4427, 80 v. 164, providing for exemption from liability unless certain articles are delivered to the safe-keeping of the inn-keeper, negligence must be averred, 98 U. S. 218.

Insurance, Fire. The petition must allege that the loss arose from the peril insured against, 16 Gray 249; and where a compliance with the conditions of the policy, as to notice, proof of loss and damage, is precedent to a right of recovery, it must be averred in the petition, 26 O. S. 348, and proved, 37 O. S. 49; but it is sufficient to plead the performance of such conditions generally, 33 O. S. 555; and if there is nothing in the terms of the policy requiring the truth of the representations in the application therefor to be averred as precedent to a right of action, a good cause of action may be made in the petition founded on the policy without setting forth the application and averring the truth of the representations therefor, Id. It is not necessary to aver that the insurer refused to rebuild or replace the property, Id. Where the policy provides that no action shall be commenced within a certain time after the loss, and the action is begun after that time, the petition must show why the limitation clause was not complied with, or it is demurrable, 1 Clev. R. 134, 216. It has been held that the petition must aver that the party has an insurable interest in the property at the time of its destruction by fire, 14 Abb. Pr. 398, or at the time of effecting the insurance, 9 Jones & S. 279; and it has also been held that the petition must allege an insurable interest in the property at the time it was insured and at the time of the loss, 46 Ind. 315; 75 Ind. 535. Where, in an action upon a policy of fire insurance, it appears from the petition that the insurance company for a specified premium executed and delivered a policy insuring A against loss by fire on specific property occupied by the insured, an insurable interest in the insured is sufficiently shown, 24 O. S. 331, 332. The value of the property at the time of the loss must be alleged, but it is not necessary to aver its value when the insurance was taken, 87 Ind. 132; 46 Ind. 315. Where a policy of fire insurance contains a provision that the loss, if any, shall be paid to a person other than the insured, it is not sufficient in an action on the policy for such beneficiary to allege and prove that he complied with the terms thereof and suffered loss by fire, but it should have been alleged and proved that the insured complied with the terms of the policy and suffered loss, 17 Bull 357; see 46 O. S. 418; ownership, 9 C. C. 46.

Insurance, Life. Plaintiff must aver the making of the policy, its terms, the payment of the premium, the death, and notice

and proof of the same. These averments, if established, constitute a *prima facie* case, 8 C. Ill., 24 C. L. J. 890. It is unnecessary to aver that the death of the insured was not caused by the breaking of any of the conditions of the policy, 9 Abb. N. C. 309; 85 N. Y. 236; nor, in an action on a policy procured by the insured for the benefit of the plaintiff, that plaintiff had any interest in the life of the insured, 80 Ill. 35; see 41 O. S. 282; but where he procures an insurance on the life of another he must aver that he had an insurable interest in the life insured, *Id.* Where it is sought to reform the contract by reason of fraud or mistake, the same should be averred in the petition, 15 Bull 197.

Judgment. Since domestic statutes are public acts of which the courts take judicial notice, neither jurisdiction nor personal service need be averred in suing on them, 31 Ind. 376; 9 Kas. 634; 39 N. H. 352; nor is it necessary to allege jurisdiction of the subject matter or of the defendant in pleading a foreign judgment of a court of record, 2 C. S. C. R. 134; 8 Cowen 311; 11 Cush. 277; and if such averment were required, an averment that the court was one of general jurisdiction would be sufficient without averring the jurisdiction of the person, 9 Blatch. 274; see 27 O. S. 600; 1 C. S. C. R. 17. If the petition sets forth the name of the court, the date or term at which the judgment was recovered, and the amount of the recovery, it will be sufficient without stating the proceedings, 7 Colo. 561, or the facts conferring jurisdiction, 30 Hun 260. It is not necessary to state that the judgment sued on remains in full force, 2 C. S. C. R. 134; 9 Ia. 592; nor that execution has been issued on it and an unsuccessful effort made to collect it, 4 Bull 215; 6 O. 521. As there is no presumption that courts of justices of other states are or are not courts of record, 13 O. 209, their jurisdiction must be specially pleaded, 7 Wend. 435; 20 Tex. 456. In an action by an assignee of a judgment, an averment of the assignment of the judgment is necessary, 7 Colo. 583; but it is not necessary to allege any demand of payment by the assignee or any refusal to pay by the debtor, 1 Hilt. 175; nor a consideration for the transfer of the judgment, 30 Ind. 481; 29 Id. 481. Where a petition to vacate a judgment avers that the judgment was procured to be entered on default for answer without evidence for a demand not founded on contract, express or implied, and its averments are admitted by demurrer, it discloses fraud in the prevailing party stating a ground for vacation, 2 C. C. R. 143.

Landlord and tenant. In an action for use and occupation, it is not necessary to aver in the petition how the relation of landlord and tenant arose between the parties, 22 How. Pr. 104. The plaintiff may declare for use and occupation and recover on the special facts shown, 12 Abb. Pr. 103. In debt or covenant on a lease it is not necessary to set forth the lessor's title, Chitty Pl. 376. Where there is a lease under seal the action must be upon the demise to recover the rent reserved; and an action for use and occupation can not be maintained, 69 N. Y. 343. An action for rent must be for all installments due, but if separate actions are brought, objection must be made before trial, 40 O. S. 322.

Libel and slander. The petition should aver that the defamatory words were published or spoken of the plaintiff, 6 Duer 688, setting forth the precise words published and not their purport, 3 O. 409; that they were published maliciously, 57 N. Y. 119; and where the libel or slander is not actionable *per se*, aver special damages, 65 Barb. 627. Where the publication is not defamatory on its face, but becomes so only by reference to extrinsic facts, the existence of those facts must be alleged, 14 How. Pr. 265;

but when the words, by natural construction, tend to injure the plaintiff's reputation, or to subject him to hatred, ridicule, or contempt, no extrinsic averment is necessary, 48 N. Y. 472. When the words are published in a foreign language they should be set forth in such language, accompanied by a translation of their meaning in English, 3 Wend. 394, and the petition should aver that they were understood by those who heard them, Id.; 20 Wis. 239, unless, perhaps, they were published in a place where such language is commonly used, W. 107. Such averment is not necessary when the words are published in English, for the word "publish" implies the presence of hearers, 51 Ind. 581. Where the special damages are the loss of customers or of the sale of property, it has been held that the petition should set out the names of such customers or persons who refused to purchase, or no cause of action is stated, 11 Abb. Pr. n. s. 388; 2 Barb. 530; 6 Neb. 254; but see L. R. 1 Ex. Div. 91; 3 Zab. 402; 94 N. Y. 15. In charging adultery it must be averred that one of the parties was married at the time of the crime, 48 Vt. 65; see Bates Pl. 521. In charging perjury at a trial before a justice of the peace, it must be alleged that the justice had jurisdiction, and that the plaintiff was sworn to testify, but it need not be averred that his testimony was about a matter material to the issue, 50 Ind. 129. In charging injury to one in his vocation, it need not be averred that plaintiff was in receipt of emolument, as that he was a paid preacher, 27 O. S. 292, 295; but it must be alleged that the words were used "in reference to his profession," 50 Ga. 238, or of and concerning his trade, 31 Me. 321. In an action for *slander of title*, plaintiff must show title or interest in the property, 3 Taunt. 246; 60 Cal. 157; must aver malice, 5 N. Y. 14; want of probable cause, 5 Kas. 141; 5 Barb. 297; see 3 Abb. Ct. App. 62; and allege special damages, 41 Barb. 186; and where the special damages are the loss of a sale or loan, the persons who refused to loan or purchase must be named, 1 Duer. 670; 5 Barb. 297. *Lien, mechanic's.* A full compliance with the statute must be shown, 30 Ark. 282. The petition should describe the property to be charged and allege that the defendant had an interest in it, 24 Wis. 563; that the materials were furnished for the building sought to be charged with the lien; it is not sufficient to aver that they were furnished to the contractor or owner and were used in the construction of the building, 73 Ind. 60; 24 Wis. 563; that the labor was performed under the contract, express or implied, 1 Mont. T. 224; that the contract was made with the owner or his agent, 35 Mo. 107; 24 Minn. 300; 27 Wis. 456, or owner or lessee, 27 Mich. 456 (and it is held an omission of this defect can not be cured by answer, Id.); that something was due for the services on which the lien was founded at the time the suit was commenced, 67 How. Pr. 130; and that the lien was filed within the time limited before the commencement of the action, 21 Ind. 344; 30 Ark. 682.

Liquor laws. § 4357 provides that a party deprived of the usual means of support, etc., by or in consequence of the intoxication or the acts of an intoxicated person, may bring an action against the seller of the liquor causing the intoxication, the owner of the premises in which the liquor was sold, or the lessor having knowledge of its sale, 25 O. S. 352; 4 Rec. 670; and § 4358 provides that notice to the seller, owner, etc., shall be given as a condition precedent to the maintenance of the action, see 42 O. S. 52. It is sufficient under these sections to set forth the statutory grounds in the petition, 21 O. S. 98. The defendants may be jointly 40 O. S. 43, or severally liable, 31 O. S. 419.

The action does not lie for causing death under § 6134; 35 O. S. 85; 31 O. S. 359. For pleading in criminal cases, see 3 O. S. 475; 4 Id. 467; 8 O. S. 391; 4 Id. 477, 487; 24 O. S. 175. Under the Scott Law, 80 v. 164; see 42 O. S. 218. Winn law, 91 v. 300; 1 N. P. 422.

Malicious prosecution. The petition must aver that the prosecution was malicious, W. 725; 50 How. Pr. 105, want of probable cause therefor, 30 Bull 120; 3 W. L. M. 324; 100 Mass. 196, and a termination of the prosecution in favor of the plaintiff, W. 725; 8 O. S. 548, 550; see 20 O. 119. Special damages to be recovered must be set out with particularity, 60 Ill. 361, as lawyers' fees, 12 Wend. 64, loss of reputation, credit, or business, 78 Pa. St. 73. The action may be joined with one for slander, 15 O. S. 173, or false imprisonment, when arising out of the same transaction, 10 Hun. 580, and may be changed by amendment to an action for false imprisonment, 14 O. S. 213, and *vice versa*, 3 Bull 1139. The burden of proof is on the plaintiff to show want of probable cause and malice, 103 Pa. St. 151. Though there has been no arrest of the person or seizure of the property, the action will lie, 46 O. S. 367, but see 2 D. 391; 40 N. J. L. 252; 90 Pa. St. 250; 9 O. 103, 104; 4 C. C. 271; 31 Bull 22.

Master and servant. In an action by a servant against the master for injuries caused by the use of defective machinery or tools, he must allege in his petition that he was employed by the defendant, 20 Barb. 449; that the master had notice or knowledge of the defect or danger, or ought to have known, or that he would have discovered it had he exercised reasonable diligence or taken proper precaution, Bates Pl. 562; citing 48 Me. 113; 56 Barb. 151; 31 Ind. 174; that plaintiff was ignorant of the defect, and exercised due care and diligence in the use of machinery, etc., 5 O. S. 541; but see Negligence, *infra*; and where the action is for injuries caused by the negligence of a fellow-servant, plaintiff must allege in his petition that defendant was negligent in selecting or retaining such servant after knowledge of his incompetency, 51 Cal. 116; 8 Kas. 658; 58 Ind. 26. In an action by a servant against his master for an injury resulting from the negligence of the latter in furnishing appliances or in caring for the premises where the work is to be done the plaintiff must aver want of knowledge on his part of the defects causing the injury or that having such knowledge he informed the master and continued in his employment upon the promise, express or implied, to remedy the defects. An averment that the injury occurred without fault on his part is not sufficient, 29 Bull 8; 49 O. S. 598; see 9 C. C. 268.

Money had and received. A form of petition under the common counts has been held good under the code, 7 N. Y. 476, as of money had and received by the defendant to and for the plaintiff's use, 29 Wis. 65; see 26 O. S. 127; that defendant is indebted to plaintiff, etc., for goods sold and delivered to him at his request, and that defendant has not paid, 32 Cal. 172. An allegation of a request or demand for the payment of the money, 63 Cal. 394, or of non-payment, 60 Ind. 188; 50 Cal. 520, though usual, is not required, but it is better to make it in the latter case, otherwise no breach is averred, Bates Pl. 121, 574. Under § 4272, to recover back money lost at gambling, the petition should aver that the money was lost at gaming, paid or delivered to the defendant or otherwise received by him, 33 How. Pr. 262, and state the aggregate amount won, 17 O. S. 464.

Mortgage. Foreclosure. The petition must show that the debt secured by the mortgage is due and owing the plaintiff, 11 N. J. Eq. 27. Where a personal judgment is sought and the action is

on the mortgage and the note secured by it, the plaintiff should aver that the defendant is indebted to him on the note, etc., setting forth or attaching a copy with the indorsements under § 5086; that the defendant executed and delivered to him the mortgage to secure its payment, 14 Kas. 101, setting out a copy of the mortgage in substance, 65 Ind. 302 (it is not necessary to attach a copy; see Bates Pl. 579); and pray for a judgment for the amount due, § 5021; 31 O. S. 80, and that the premises may be sold and the proceeds applied to the payment of the judgment. It is not necessary to aver a record of the mortgage when the action is against the original mortgagor, 13 How. Pr. 95; nor when defendant is a subsequent purchaser of the mortgaged premises, who is alleged in the petition to have assumed the payment of the mortgage debt as part of the purchase money, 63 Ind. 44. An averment that the note and mortgage were duly assigned to plaintiff is sufficient without setting out a copy of the assignment, 34 Ia. 452; see 4 O. 318; 1 C. S. C. R. 378; and as the assignment of the note carries the mortgage, 4 O. 318; 1 C. S. C. R. 378, where the petition shows an assignment of the debt, it need not show an assignment of the mortgage, 6 Kas. 395. Where the debt secured by the mortgage is payable on demand, demand before suit to foreclose need not be shown, 35 O. S. 357; but if the mortgage securing a demand note is to be void if the note is paid "within sixty days after such demand," an averment of demand at least sixty days before suit to foreclose is necessary, Id. 343. The petition should state whether the other notes have been paid, and if not by whom they are held and the dates of their maturity, 9 Porter (Ala.) 79; and if the note has been renewed that fact must be stated, 31 Conn. 74. If there are infant defendants the petition should allege their interests, 6 How. Pr. 129. An averment that a party who is made a co-defendant with the mortgagor has, or claims to have, some interest in or lien upon the mortgaged premises, which, whatever it is, is subject to the lien of the plaintiff's mortgage, is sufficient without an averment of the character of the interest, 20 Kas. 624; see 51 O. S. 421; but an averment in an action to foreclose against a person other than the mortgagor, that "he is now the owner of the land," is not sufficient to show that the mortgage constitutes a lien on the land as against him, since he may have acquired the land before the mortgage was executed, 89 Ind. 54. The petition in an action against an administrator to enforce the lien should aver the presentation of the mortgage claim for allowance, 46 Cal. 222. Plaintiff should pray for a judgment for the deficiency, if any shall exist, against a purchaser or assignor or guarantor of the mortgage who may be liable for the debt, 12 Abb. Pr. 331.

Mortgage. Redemption. The petition must show that plaintiff has an interest in the equity of redemption, 47 Mich. 28; and when other than the mortgagor, the nature and derivation of his title, 9 Mich. 465; that the plaintiff was not a party defendant in the foreclosure suit, 50 Cal. 549; and aver a readiness to pay or offer to pay whatever is found to be due, 60 Barb. 372; and where an accounting of rents is sought, allege that the plaintiff is ready and willing to redeem when the amount necessary to be paid therefor shall be ascertained, and intends so to do, and that he has demanded an accounting, which was refused, 87 Ind. 400.

Municipal corporation. When a municipal corporation is organized under a general law, the fact of its existence must be averred and proved, 62 Ind. 4; 43 Ia. 313. In Ohio such corpor-

ations are organized under general laws. A description in the petition of the defendant as a city is a sufficient averment that it is a municipal corporation, 25 O. S. 143, 154; but when it is desired to bring a city within a certain class, or as having a certain population at a certain census, it is necessary to aver that fact, 35 O. S. 319. As judicial notice is taken of the existence of counties, no averment of corporate existence is required, 1 Bates Pl. 239. A city suing for a claim formerly due a village from which it has been advanced to such city will not be required on motion to set out in its petition the proceedings by which said village was advanced to a city, 1 C. C. R. 340. In an action against a city for injuries caused by defects or obstructions in its streets, the petition must allege *notice or knowledge* by the city of such *defects or obstructions*, or facts from which notice or knowledge can be reasonably inferred, 96 Ind. 51; 46 Ia. 567. Where the petition fails to aver that the corporation negligently caused the obstruction, or, not having caused the same, had actual notice of its existence and failed to remove it within a reasonable time; or that, in the absence of actual notice, such obstruction continued for such length of time prior to the injury that notice was fairly to be inferred, it is bad on demurrer, 2 C. C. R. 145; Id. 366. And in an action against a municipal corporation for injuries caused by falling on a sidewalk made slippery by accumulations of snow and ice, the petition must show that the city had notice, actual or constructive, of the condition of the walk, and, having such notice, that it was its duty to remedy it, 44 O. S. 505; see 1 N. P. 210. Where by statute (§ 2326) plaintiff must file a claim for damages with the corporation prior to bringing the action, such demand or claim must be averred in the petition as a condition precedent to bringing the action, 5 O. S. 523. In an action to enforce a street assessment, where the petition avers that the city council duly passed and published an ordinance, and that written notice thereof was caused by the city to be duly served, etc., it contains, in the absence of a motion to make more definite and certain and as against a general demurrer, a sufficient averment of the valid passage and publication of the resolution and proper service of a valid notice, 1 C. C. R. 90. In an action against a city for negligently changing the grade of a street, an allegation that the city "raised the grade," is equivalent to an allegation that the grade was raised in pursuance of an ordinance, since the city could only act in such matters by ordinance, 78 Mo. 107; and an allegation that it had before "fixed and established the grade as it was lawfully authorized to do," is a sufficient statement of its establishment without setting out the ordinance, 22 Ia. 590. §§ 1777 and 1778 provide for the bringing of actions to restrain the misapplication of the funds of a municipal corporation or an abuse of its corporate powers, by the city solicitor, or, on his failure on written request, by a tax-payer in his own name on behalf of the corporation, 2 C. C. R. 237; see 3 C. C. 201. Where the petition shows that the solicitor is acting as attorney in his official capacity for a tax-payer in whose name the action is brought, it need not be averred that he had been requested in writing by the tax-payer to bring the action, 29 O. S. 291, and it is not necessary that the petition be signed by the city solicitor, 1 C. C. R. 340. In an action against a municipal corporation to recover damages for injuries sustained from the discharge of a cannon in a public street by an assembly of disorderly persons, an allegation in the petition that the authorities of the corporation "had negligently and carelessly given permission to such persons to fire the cannon" may be construed, in view of the whole

pleading, as an allegation that the authorities took no steps to prevent such firing, 42 O. S. 625. Assessment, 2 N. P. 39.

Negligence. It is not necessary to set out in the petition the facts constituting the negligence, 77 Mo. 232; 10 Minn. 418; 80 Ky. 82; 15 Fed. Rep. 588; 75 Mo. 295; nor the degree of negligence, 10 How. Pr. 97; 47 Ind. 368; but a bare allegation that defendant was negligent has been held not sufficient, 29 Ind. 426; and in an action against a railroad company for negligence in the management of its trains, it has been held that the petition should show in what such negligence and carelessness consisted, and not charge the same in general terms without disclosing any specific acts or omissions, 90 Ill. 425. So in an action against a municipal corporation for injuries sustained by a defective sidewalk, the better practice is to set out in the petition the dangerous character of the sidewalk, 2 C. C. R. 366. As a rule, however, a general allegation of negligence is sufficient without setting out the facts constituting it, 62 Ala. 494; 57 Ind. 297; 49 Mich. 380; 28 Minn. 69; 25 N. J. L. 381; and this is especially so where the facts constituting the negligence lie more properly in the knowledge of the defendant, 1 Sand. 89. Allegations of malice are not necessary and will be treated as surplusage, 24 Ia. 336; 45 Mo. 371. The plaintiff is not, in this state, required to allege in his petition that he was without fault "unless the other averments necessary to constitute a cause of action suggest the inference that he was guilty of contributory negligence," 40 O. S. 376; see 35 O. S. 627; 10 Bull. 292. As to the sufficiency of averments of a petition in an action against a railroad company for injuries caused by the explosion of a torpedo negligently exposed upon its track and picked up by a child nine years of age, 45 O. S. 11; see 2 C. C. R. 504; 45 O. S. 470; 46 O. S. 283; in action for injuries sustained in alighting from moving train—that servant causing injury was acting within the scope of his employment, 2 C. C. 504; against druggist for selling poisonous drug, 45 O. S. 470. Sidewalk, 1 N. P. 210. Sewer, 9 C. C. 294.

Nuisance. The petition should state the facts constituting the alleged nuisance, 3 O. S. 330; 11 O. S. 362, 365; though it is not necessary to detail all the particular injuries which result therefrom, 61 Mo. 359. Where the action is against one who continues but who did not create the nuisance, it should be averred that before the commencement of the action he had notice or knowledge of the existence of the nuisance, 51 N. Y. 573; 44 Me. 154; but a request for its abatement is not necessary, 51 N. Y. 573. Generally negligence need not be averred, 10 Am. Rep. 184; 2 N. Y. 159; though there are exceptions to this rule, 51 N. Y. 476; 68 Id. 283; 30 Vt. 610. Damages such as necessarily and naturally result from the injury need not be specially pleaded, 67 N. Y. 267, but damages which are the natural, though not the necessary, result of the act complained of must be set forth specially, 4 N. Y. 130; 21 Minn. 362; and when the alleged nuisance is a public one, special damages must be averred, 2 D. 516; see 23 O. S. 523. Fish brine exposed in uninclosed yard near a highway, petition stating no cause of action, 7 O. (Pt. 1) 216.

Partnership. A description of the firm as "a firm doing business under that name in the state of Ohio" is sufficient under ‡ 5011 without stating that it was formed for the purpose, etc., 2 C. S. C. R. 21. An assignment, by one partner, of the firm property in favor of a creditor of the firm made without authority of his co-partners is void, 29 O. S. 441; and if the assignment is so made with the authority or consent of the co-partner, it must affirmatively appear in the petition, or the failure to give such

authority or consent satisfactorily explained, else the petition will be bad on demurrer, 6 Pac. L. Rep. 367. A surviving partner may sue for the personal property and effects of the co-partnership, 45 N. Y. 786, and the petition in such action which alleges the existence of the co-partnership, the death of the co-partner, and the survivorship is sufficient, 16 Nev. 85. Since partners can not sue each other except after a settlement of accounts, a balance struck, dissolution, or promise to pay, the petition must allege one of the exceptions in such an action, to be available as against a demurrer, 57 How. Pr. 149.

Penalty. The facts constituting the offense must be specially set out, 13 Johns. 428; but the petition need not set forth the particular statute unless it is one not judicially noticed, 67 N. Y. 506; and it is sufficient to allege that the acts were in violation of the statutes, *Id.* Since municipal ordinances are not judicially noticed by the courts, 69 N. Y. 250; 23 Minn. 254, the petition in an action for the violation of a municipal ordinance should set out the offense charged and the substance of that part of the ordinance which has been violated, with a reference to the title, date, or section, 40 Vt. 450; 90 Ind. 258; 49 Ind. 329; 14 Gray 52. The petition need not aver non-payment, 93 Ind. 118. Under 71 v. 146, providing for the recovery of penalties for overcharges by railroad companies, a petition was held not bad on demurrer for want of an averment that the purchaser of a ticket was in fact transported on the ticket for which the excessive fare was exacted, or that the excessive fare was paid by the plaintiff in the due course of business, 37 O. S. 265. Under S. & S. 669, providing for actions by township trustees to recover a penalty for obstructing public roads, where the obstruction was caused by railroad cars or locomotives, it was held that the petition must aver that the road was obstructed unnecessarily by permitting such cars, etc., to remain upon or across the public highway for a longer period than five minutes, to the hindrance of, etc., 30 O. S. 62; but that in actions for obstructions to public roads caused by agencies other than railroad cars or locomotives, the word "unnecessarily" forms no essential part of the description of the cause of action, *Id.* That several penalties may be recovered in one action, see 33 O. S. 384; 37 O. S. 265.

Physician and surgeon. A physician or surgeon does not insure a perfect cure, and an averment in the petition in an action for malpractice that he had contracted to effect a perfect cure must be sustained by proof of an express promise, 7 O. (Pt. 2) 123; 17 O. S. 253, 259; W. 351, 466. In such action an averment that defendant was employed as a physician is sustained by proof that he held himself out as "a cancer doctor," and as having skill and experience in the treatment and cure of cancers, 29 O. S. 577. Proof that defendant accepted the employment will sustain an averment that he was employed at "his special instance and request," *Id.* It is unnecessary to allege a consideration for the employment, 28 Ill. 438; and since the liability in case of malpractice does not arise out of any contract or direct privity, but out of a duty, which the law imposes upon the physician to avoid acts in their nature dangerous to the lives of others, 6 N. Y. 397, the petition need not aver by whom the defendant was employed, 46 Ind. 159. In an action by a husband for damages resulting to himself from injuries to his wife, caused by malpractice, damages for loss of services which appear necessarily to result from the nature of the injury may be recovered as part of the general damages, without being specially pleaded, 32 Minn. 243. The cause of action does not survive the surgeon's death, 2 W. L. M. 203; but after the action is begun, it

does not abate, Bates Pl. 658; 29 O. S. 577. In an action for damages for personal injuries, evidence as to the value of physician's services is not admissible when they are not averred in the petition, 1 C. C. R. 36.

Recognizance. The action is in the name of the state, 29 O. S. 452. The petition need not show the authority of the state to sue, 10 Rec. 307. In an action on a forfeited recognizance, it is not necessary to insert in the petition a copy of the order of forfeiture, nor to allege that the order of forfeiture was "duly made," 14 Kas. 318. Copy to be attached to petition; omission taken advantage of by motion to make more definite, and not ground of demurrer under the code, so held in 12 O. S. 60, 66.

Reformation. The petition must aver a mutual mistake, or a mistake by one party and fraud by the other, 59 N. Y. 244; 14 W. Va. 264. A statement merely showing the defective execution of a mortgage will not suffice, 1 O. S. 110; and it is not error in the court to fail to reform an instrument where there is no prayer for such relief and no allegation of mistake or fraud, 17 O. S. 215. The petition must not only show that the mistake was mutual, but that the party seeking the reformation would be prejudiced by a failure to reform, 24 Kas. 389. It must show that the contract, as reduced to writing, does not contain what both parties intended it should, point out the mistake, and aver in terms what the tenor of the instrument or the true contract ought to be, 3 Duer. 680; 6 Oreg. 193; 47 Ia. 173. An action may be brought for the reformation of a contract, and for the recovery at the same time upon the contract when reformed, 31 O. S. 628; see 21 Bull 141, 143; 46 O. S. 265.

Rescission. The petition should allege a restoration of or offer to restore the consideration, 52 How. Pr. 35; see 1 Clev. R. 90; 40 O. S. 190, unless the property is of no value, 24 O. S. 67, 345; and in an action to rescind the sale of real property on the ground of deceit by the vendor in misrepresenting the title, a tender of a deed conveying the property back before the beginning of the action has been held unnecessary, 19 Minn. 32; and in an action to set aside a contract for fraud, it is held unnecessary to allege a tender back of the consideration, 46 How. Pr. 417. A performance on the part of the plaintiff of conditions in the contract need not be alleged in his action to rescind for failure of defendant to perform, 16 O. S. 444, 453. In an action to set aside a conveyance for false representations, it must be alleged that the plaintiff relied on such representations, and was misled by them, to his injury, 6 Oreg. 413. Where the ground of the rescission is fraudulent statements that defendant was the owner, the petition must set out the facts showing that he had no title. It is not sufficient to allege merely that he is not the lawful owner, 6 Neb. 134; nor to state that defendant never had a good title, and that the title is defective, 7 Bush. 4.

Sales. In an action for goods sold, a petition which avers that the defendant is indebted to the plaintiff in a certain sum for goods sold and delivered to him at his request, and that the defendant has not paid for the same, states a good cause of action, 7 N. Y. 476; 49 Cal. 141; 3 Kas. 372. It is unnecessary to allege a promise to pay, 17 N. Y. 230, or that the demand has not been paid, or that it remains due and unpaid at the time of commencing the action, 10 Hun 242. In an action for damages for non-delivery, where payment and delivery are concurrent conditions, an offer and readiness to pay must be averred, 29 O. S. 362. So where the delivery was to be at a particular time and place, an averment of readiness and willingness to receive and pay for the goods is required, 35 O. S. 104.

Services. Seduction. An averment in the petition that defendant was on a day named indebted to the plaintiff in a certain sum of money for work and labor before that time performed for him at his request, states a good cause of action, 48 Cal. 364; see 33 O. S. 336, 357; but where the contract is not completed, or certain conditions remain to be performed, the plaintiff should set out the special agreement and allege a partial performance, 9 Abb. Pr. 353; 4 Duer. 295. In seduction it is sufficient to allege as to loss of services that the wrongful act was to deprive plaintiff of them, without alleging ability to perform the services, the nature of them, or the actual loss, 32 O. S. 299, 312. It is not necessary to aver deception, or to set forth the acts made use of to deceive, 59 Ind. 566; but it should be averred that plaintiff knew the relationship, 6 Bush. 249; 12 Abb. Pr. n. s. 187. Damages for injury to plaintiff's feelings and sensibility may be recovered under a general allegation of damage, and need not be specially averred, 57 N. H. 59; but damages for prospective loss of service during minority must be declared on specially, 1 E. D. Smith, 453. Attorney's services, see 29 Bull 115.

Specific performance. The petition must show a contract, including date, terms, and stipulations, 44 Tex. 390; that the plaintiff offered to perform on his part, and that the defendant refused, 9 Minn. 157; but if it is averred that defendant expressly repudiated the contract, and gave notice of his refusal to perform, a tender of performance need not be averred, 13 O. S. 306. It is enough to aver a readiness and willingness to perform, 45 N. Y. Superior Ct. 157. Reformation and performance may both be asked for and obtained in the same action, 42 O. S. 449; 16 O. 490; and the prayer may be for specific performance or rescission in the alternative, 42 O. S. 449; but a petition is bad which seeks both specific performance and rescission, though, if no objection is made and damages awarded, it will be regarded as seeking damages alone, 16 O. S. 118, 129; generally §§ 5797-5802.

Stockholder's liability. A stockholder or creditor may enforce such liability by action, jointly, against all the holders or owners of stock, for the benefit of all the creditors of the corporation, and against all persons liable as stockholders, § 3260. The petition should aver that defendant was a stockholder at the date the debt was incurred, 2 C. S. C. R. 350; that plaintiff recovered a judgment against the company on which execution was issued, and returned no goods or chattels, lands and tenements whereon to levy, and that the company has no property subject to execution from which judgment can be made, and said judgment remains in full force, unpaid and unsatisfied, Bates Pl. 739. As the stockholders are liable in double the amount of stock owned by them, Const., Art. xiii. § 3; § 3258, that fact should be averred; and if the names of stockholders are unknown, the petition should contain a prayer for a discovery of their names and amounts due from each, see 7 N. Y. 147; 11 O. 273, 292. In an action by creditors to enforce statutory liability, where it is alleged that the company is insolvent, entirely ceased to do business, made an assignment, etc., it is not necessary further to allege that plaintiff had recovered a judgment on which an execution had been returned unsatisfied, 46 O. S. 1; 29 Bull 78; 49 O. S. Sufficient averment of incorporation, 27 Bull 283; 49 O. S. A petition which avers that each of the defendants except the corporation, is the holder of a specified number of shares of the capital stock contains a sufficient allegation that defendants are stockholders. It need not be averred in terms that the defendants are owners of the stock held by them, 48 O. S. 219; see generally 24 Bull 133.

Subscription. In an action to collect a stock subscription, the petition should show that the corporation is authorized to have a capital stock and take subscriptions to the same, 24 Minn. 327, and aver a tender of the stock to the defendant, 23 Minn. 439; but where the subscriptions are to be paid in installments, an averment of readiness to deliver the certificates is sufficient, 2 D. 261; and if the action is brought by an assignee making the original company and the subscribers parties, the want of such averment will not render the petition fatally defective, Id. In case of a subscription with a condition attached, it is not necessary to aver that the subscriber was notified of the acceptance of his subscription, it being sufficient if the petition avers that he had notice of the performance of the condition, 15 O. S. 323; but where the contract contains a condition that a certain amount of stock shall be subscribed for as a condition precedent, the plaintiff must allege that the requisite amount of stock has been subscribed, or facts necessary to show a waiver of such condition, 2 Met. (Ky.) 314; 5 Neb. 76; 3 Kas. 55, unless the action is upon an unconditional promise to pay, 13 Bush. 32. In an action on a railroad subscription contract conditioned to be paid in installments as might, from time to time, be called for by the directors, provided that the same should be expended upon a certain line of road, to be thereafter designated by the company, it was held that the petition showing neither the construction of the road along the line designated nor an offer nor readiness to expend the money subscribed according to the condition was defective, and that upon demurrer by plaintiff to an answer to such petition, such defects in the petition required the petition to be overruled, 10 O. S. 241. Under § 3243, providing for the creation and regulation of incorporated companies in this state, where a railroad company sues to recover unpaid installments of stock, an allegation in the petition that its board of directors required subscriptions to its stock to be paid in installments of a certain amount is material to its right of recovery, 26 O. S. 310; and where installments are payable on requisition of directors, and on publication of notice, the facts of requisition and publication must be set forth with convenient certainty of time and place, 9 O. 136.

Sureties. See § 5845 et seq. In an action for contribution, the petition should aver the obligation of the parties as sureties, the payment of the debt by plaintiff, that plaintiff notified defendant of such payment, demanded contribution from him, and that no part of the amount has been paid, 4 Dev. (N. C.) 360, 363; see 5 O. 444; 9 O. 106; 16 O. S. 552; 35 Bull. 324.

Trespass. The petition should aver possession, 38 Barb. 9, or ownership, 7 Kas. 35, and possession would sufficiently appear from an allegation of title, 38 Barb. 9; 8 O. 40, 42. It is not necessary to allege, in trespass on land, that the injury was forcible, 14 Cal. 81; 28 Conn. 493, or the act was wrongful, unlawful or without license, 64 Ind. 98. A petition in trespass for cutting down and carrying away the plaintiff's trees is good without an averment that the land where the trees were belonged to the plaintiff, W. 500. In an action against a railroad company for trespass in laying its tracks in the public street, between the center thereof and the plaintiff's lots, it is sufficient for the plaintiff to allege his ownership of the lots and the commission of the trespass thereon, 21 Minn. 362. The plaintiff's ownership

in the street will be implied from an averment of his ownership of the adjacent lots, *Id.* Special damages must be averred to be recovered, as loss of rents, custom, etc., 21 Minn. 364.

Trust. In an action to have a trust declared, all the facts through which the trust is claimed should be set out, 23 Me. 182. When plaintiff seeks to have an implied trust in lands declared on the ground that he contributed to the purchase money, he must aver and prove that he furnished a definitely ascertainable aliquot part of the purchase money, 17 O. S. 510. A bill to establish a trust in property supposed to have been purchased with trust funds must allege that fact, 33 Ala. 497. If it is sought to enforce the execution of a trust in the name of a mere volunteer, and for his benefit, a declaration of trust in his favor must be alleged, 19 Ala. 259. A *cestui que trust* who seeks to establish a stale trust, should set forth specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, the means used by the respondent to fraudulently conceal the facts from him, and when he first had knowledge of his rights, 2 Wall. 87. Parties claiming under or against a will can not maintain an action for the mere purpose of obtaining the court's opinion as to its legal meaning, when no trust is involved and no advice to an executor or other trustee is requested, 29 O. S. 147.

Warranty. In an action on a warranty a valid sale must be averred as a consideration of the promise of warranty, and it is sufficient to aver that the sale was for a certain price, without specifying it, for this shows a consideration, 12 O. S. 24; but if the pleader attempts to set out and describe particularly the consideration and introduces a written contract of sale, containing a different consideration, it must be rejected upon the ground of variance between the statement in the pleading and the proof, *Id.* In averring a breach, it is sufficient to negative the words of warranty without stating the particulars, 27 Vt. 720. In an action on a warranty that an article was fit for a designed purpose, the purpose for which the article was warranted fit must be stated, 3 M. & G. 868.

Will. Under § 6202, an executor, administrator, guardian, or other trustee, may maintain an action in the common pleas against creditors, etc., asking the direction or judgment of the court in any matter respecting the trust, estate, or property to be administered, or, in case they refuse on request in writing, a creditor, legatee, etc., may bring such action; but when no trust is involved and no advice to an executor or other trustee is requested, parties claiming under or against a will can not maintain an action for the mere purpose of obtaining the court's opinion as to its legal meaning or effect, 29 O. S. 147. A petition filed under this section by an executor, stating that doubts are entertained by himself and others as to the validity of a certain provision in the testator's will requiring him to erect a monument, and that he desires the direction and judgment of the court whether the provision is valid, but not alleging that there is now in his hands, or will come under his control, any money or property which might be applied in defraying such expense, does not state facts sufficient to require such direction or judgment of the court, 35 O. S. 503. In an action to obtain the construction of a will, the petition should state that the testator left property, and also whether real or personal or both, 43 Barb. 404.

410. In an action to contest the validity of a will, the petition must allege the death of testator, and must show the plaintiff to have some interest of some kind in the subject matter involved in the contest, 64 Ind. 53. A testator's mental unsoundness is sufficiently averred by an allegation that at the time of signing the supposed will he was not of sound and disposing mind; but, on the contrary, he was at such time of unsound mind, S. C. Cal. 3 West. C. Rep. 377. It is not necessary to name the persons exercising undue influence, as they may be unknown to plaintiff, Myrick's Prob. Cal. 259; see § 5858 et seq.

§ 5061. Each cause of action to be separately stated, etc. When the petition contains more than one cause of action, they shall be separately stated and numbered. [51 v. 57, § 86; S. & C. 973.]

The irregularity is reached by motion and not by demurrer, 10 O. S. 441; 29 O. S. 138; otherwise it is waived, 8 O. S. 423; 30 O. S. 133; 2 C. S. C. R. 14, 21; and the refusal of a motion to compel plaintiff to separately state his causes of action is not ground of error unless the opposite party is prejudiced, 36 O. S. 43. It is a general rule, however, that facts constituting a single cause of action can not be subdivided into two or more causes of action, 16 O. S. 88; 8 O. S. 215; 24 Fed. Rep. 580; and where there is one cause of action, and it is set forth in several counts, plaintiff may be compelled by motion to elect on which one he will rely, 10 How. Pr. 281; 8 O. S. 215 16 O. S. 281; but where he is uncertain as to the grounds of his recovery, or there is a fair and reasonable doubt as to his ability safely to plead them in one form, he may set forth his causes of action in distinct statements, and will not be compelled to elect as between them, 65 How. Pr. 1; 61 Cal. 209; 12 Abb. n. c. 309; 31 Hun 432; as where plaintiff seeks to recover upon two grounds, both of which may be true, and he does not know which one, he may state them as separate causes of action, and in the alternative in one petition, 9 Bull 355; 16 Bull 399 (but see 1 C. C. R. 203, 207); and since our statute does not require that the facts shall be stated without unnecessary repetition, this mode of pleading can not be regarded objectionable, 9 Bull 355. "There may be actually two grounds, or, being only one, certain supposed grounds may be so connected that the plaintiff will not be able to tell in advance which will be established upon the trial. The code will have failed in its chief object if he is forbidden to develop every ground upon which he bases his right to recover," Bliss Code Pl. § 120; see Pomeroy Rem. § 576; 27 Wis. 327; 1 Abb. Pr. 442. In an action against a railroad company for killing a horse, counting on neglect to keep fences in repair and negligence in running its trains, the court overruled a motion to compel plaintiff to elect, saying that the addition of a tort to a separate and distinct act in violation of a contract did not deprive the injured party of the right to complain at the same time of both wrongs, 41 O. S. 233.

Single causes of action—illustrations. The following are instances of single causes of action: Statutory damages and costs of protest on a bill of exchange, 1 H. 575; damages for fraud in the sale of diseased sheep, and for affecting other sheep of plaintiff, and injuring his pasture, 21 O. S. 655. Loss to plaintiff of his wife's services and the expenditure by him of means and labor

in healing and curing for himself and children, such damages being the result of the same negligent act, constitute but a single cause of action, 57 Ind. 297. Items on a running account for merchandise sold constitute but a single cause of action, and a recovery in one is a bar to a subsequent action for the residue, 13 Wend. 646. A change of the grade of a street and change of the sidewalk to correspond are parts of the same thing, and an abutter, by bringing suit for the recovery of damages for the one, splits up his cause of action and bars himself from the right to sue for the other, 63 Ia. 36. Different acts of fraud in obtaining money and different fraudulent claims at different times in pursuance of an alleged conspiracy, may be treated as a single cause of action, 5 Hun 353; 63 N. Y. 194. A petition which avers for one cause of action a mortgage given to secure a usurious loan and demands its cancellation, and, for another, avers that defendant wrongfully took and detained chattels specified, 32 Hun. 194; action to enforce trust and determine rights under will, 2 C. C. 441. An entire conversation in which slanderous words were used may constitute a single cause of action, 16, Ia. 301. Services, a part of which were rendered to a firm of which defendant was surviving partner, and the other part, under the same contract, to defendant alone, may be sued on as a single cause of action, 58 Wis: 188. As instances of separate causes of action, may be mentioned: An injury to a cab and an injury to the cab-driver by the same collision, 14 Law Rep. Q. B. 141; distinct contracts of sale, 15 Pick. 409; 28 Minn. 418; damages by overflow to property assigned to plaintiff, and damages by overflow after he became the owner, 1 D. 58. In action to recover damages for different breaches of contract, plaintiff not required to separately state and number different causes of action based upon each separate breach, 11 C. C. 231. Refusal to sustain motion to separately state, etc., when not error, 36 O. 8. 43; generally § 5019.

SUBDIVISION III. DEMURRER.

§ 5062. When defendant may demur to petition. The defendant may demur to the petition only when it appears on its face either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action.
2. That the plaintiff has not legal capacity to sue.
3. That there is another action pending between the same parties, for the same cause.
4. That there is a misjoinder of parties plaintiff.
5. That there is a defect of parties, plaintiff or defendant.
6. That several causes of action are improperly joined.
7. That separate causes of action against several defendants are improperly joined.

8. That the petition does not state facts sufficient to constitute a cause of action. [51 v. 57, § 87; S. & C. 973.]

General remarks. A demurrer is a pleading under the code, 5 How. Pr. 206. It admits the truth of the allegations demurred

to, 25 O. S. 349, so far as is necessary to determine the question raised, 5 O. 109; but it only admits what is well pleaded, 13 O. S. 228; 25 O. S. 443; 32 O. S. 44; 30 O. S. 37. It admits the truth of facts that are relevant and well pleaded so far as is necessary to determine the question raised, 25 O. S. 349; 68 N. Y. 294. It does not admit statements of legal conclusions, 30 O. S. 41; 29 O. S. 341; 33 O. S. 384; nor the truth of conjectures, 26 O. S. 452, nor averments as to the meaning or contents of a paper set forth in a pleading or made part thereof, 68 N. Y. 294, nor inferences from facts which do not support them, 33 O. S. 384; 32 O. S. 374. A demurrer searches the whole record, and judgment will be given against the first party whose pleading is defective, 10 O. S. 241; Bliss Code Pl. § 417a; 26 O. S. 652.

A *general demurrer* to a petition containing several causes of action will be overruled if anyone of the causes of action is sufficiently stated, 26 O. S. 310; 16 O. S. 455; and a general demurrer to an answer must be overruled if any part of the answer states a good defense, 1 Clev. R. 219; and a general demurrer to each of the several paragraphs of an answer will be overruled where, as a whole, they state a good defense, 30 O. S. 308; see 9 C. C. 249.

A *joint demurrer* by several defendants will be overruled if a good cause of action is stated as against any of them, 9 Neb. 515; 11 Neb. 192. The objection to which a demurrer lies must appear upon the face of the petition, otherwise they should be taken by answer, 10 Abb. N. C. 85. One can not *demur and answer at the same time* to the same defense; he must elect to do the one or the other, 6 O. S. 573; 10 O. 137. It is not good practice to demur and move to have a pleading made more definite and certain at the same time, 2 D. 499; and it is irregular to file *two demurrers to the same pleading*, 38 Wis. 394; but where two demurrers were filed to a petition, one for failure to state facts sufficient to constitute a cause of action and the other for misjoinder of causes of action, and no objection was taken, it was held that they should be treated as one demurrer on two grounds. *Id.*

A *demurrer does not lie* for an omission to attach a copy of an instrument to a pleading, 12 O. S. 60; 10 Neb. 527, to a bill of particulars before a justice of the peace, 1 C. C. R. 85, where facts are stated as matters of belief only, 13 O. S. 228, for indefiniteness or uncertainty in pleading, 8 O. S. 298; 46 O. S. 44. It does not lie to a process, 3 W. L. M. 195, to a part of a single cause of action, 2 C. S. C. R. 14, for misnomer, 17 O. 607, because the pleading is not separately stated or numbered, 10 O. S. 441. It does not lie to a petition in error, 2 W. L. M. 465, to a prayer for relief, 11 Neb. 192, to matters of form, 20 O. 100, to a denial, 26 O. S. 310; 10 O. S. 451, and seem to be the caption of a pleading, 22 Kas. 725, 729, because a plea or answer is not sworn to, 37 Ind. 208. Argumentativeness is not ground of demurrer, 100 Ind. 85. The remedy in all such cases is by motion, and it is only when the pleading is incurable by amendment that demurrer lies, see 2 Bates Pl. 962. A demurrer to evidence is not sanctioned by the code. The better practice is to move to exclude the evidence or instruct the jury that it is insufficient, 34 O. S. 294; see 45 O. S. 130.

Waiver. A failure to demur waives every objection except those to the jurisdiction of the court, and that facts sufficient to constitute a cause of action are not stated, § 5064; 13 O. S. 72. A demurrer is waived by filing an answer, 12 O. S. 60; 7 Neb. 237. Filing an answer with a demurrer to the same defense waives the demurrer, 30 Ia. 221. Filing a demurrer to an amended

pleading, waives demurrer to original, 44 Ia. 512. Waiver of error by answer, etc., 33 O. S. 555; but see 19 Bull 270 as to statute of limitations; and where the court below sustains a demurrer and the plaintiff afterwards files a new amended petition he waives any error that may have been committed in sustaining the demurrer to the first pleading, 16 O. S. 1. A demurrer is waived by submitting to an appeal, 18 O. S. 72, 75; and error in sustaining a demurrer is waived by setting up the same matter in the answer or reply, 17 O. S. 330; 23 O. S. 1.

Miscellaneous. When a demurrer is abandoned or withdrawn it is no longer a part of the record, 14 O. 204; 74 N. Y. 495. Taking leave to reply is equivalent to withdrawing a demurrer, 10 O. 405; but if defendant's demurrer be overruled with permission to withdraw it upon terms, and he goes to trial without complying with the terms, the demurrer will form a part of the record, and is an admission of the facts stated in the pleadings to which it is interposed, Boone Code Pl. § 46; 22 N. Y. 472. Where a demurrer to an answer is good as to one defense and bad as to another, it should be sustained in part and overruled in part, 35 Hun 410. *Final judgment* may be rendered on demurrer, 22 O. S. 159; 24 O. S. 445; and leave to amend need not be granted unless asked for, 22 O. S. 159; and judgment by default may be rendered after sustaining a demurrer to an answer, 3 Bull 894; 6 Id. 247; but judgment on demurrer is improper in a will contest, 14 O. S. 157. If the court is equally divided a demurrer must be overruled, 12 O. 21. Waiver by answering over, see 45 O. S. 543; 12 Bull 319.

That the court has no jurisdiction, etc. A demurrer for want of jurisdiction of the person will rarely lie for the reason that the pleadings do not show the residence of the parties, Bliss Code Pl. § 406. An objection for want of jurisdiction may be taken by demurrer where it appears upon the face of the pleadings, 32 O. S. 602; otherwise it must be by answer, 14 Hun. 89; 15 How. Pr. 500. It is not, however, waived if not taken by demurrer or answer, § 5064; 4 Abb. n. c. 111. It may be raised at any stage of the proceedings. It may be raised on appeal, 36 Barb. 38. "The meaning of the clause that the court has no jurisdiction, etc., is that the person is not subject to the jurisdiction of the court, and not that the suit has not been regularly commenced. If the suit has not been regularly commenced, the defendant must relieve himself from such irregularity by motion," 8 Barb. 541; s. c. 5 How. Pr. 96. A demurrer only looks to the pleading, and not to the process, 58 Ga. 199. If a demurrer be interposed to a petition containing several causes of action properly united, but of one of which the court has no jurisdiction, it will be overruled if it is to the whole petition, and assigns no cause of demurrer except the improper union of several causes of action, 3 Duer. 643. The demurrer in such case should be limited to the cause of action of which the court has no jurisdiction, Boone Code Pl. § 47. A demurrer to the sufficiency of the petition does not raise the question of the jurisdiction of the court. It is a specific ground of demurrer and should be assigned, 48 O. S. 558.

That plaintiff has not legal capacity to sue. The objection that plaintiff has not legal capacity to sue, when it appears on the face of the petition, should be taken by demurrer, 13 O. S. 210; 11 C. C. 269. Unless taken by demurrer or answer, it is waived; 14 O. S. 448; 36 O. S. 68. It lies where a partnership does not show a right to sue under § 5011, 13 O. S. 210; where it appears upon the face of

the pleadings that plaintiff suing as a corporation is not such, 26 O. S. 565; 29 Bull 61; 40 Barb. 571; 37 N. Y. 648; where some legal disability of the plaintiff, such as infancy, idiocy, or coverture, is disclosed, 31 Ind. 355; 11 Kas. 128; 16 Neb. 483. It is held that it can only be sustained on these grounds, 67 Ind. 570. Mr. Bliss says that this is too narrow a view to take of the statute, and that incapacity to sue may arise from want of title to the character in which plaintiff sues, Bliss Code Pl. § 408, citing Moak's Van Stan Voord [*668]; as when an executor does not appear to have proved the will of his testator, or appears to have proved it in an improper or insufficient court, as he does not show a complete title to sue as executor, a demurrer will lie, Bliss Code Pl. § 408; Mitford's Eq. Pl. [*155]; and when an action is brought by a foreign executor or administrator, without showing authority from the state in which the proceeding is had, a demurrer will lie for want of capacity to sue, 26 How. Pr. 15; and where an invalid appointment of a receiver has been made, demurrer should lie for incapacity to sue, 3 Abb. Pr. 119. In a writ of *quo warranto* upon the relation of certain persons, a general demurrer will not raise the question as to the right of the relators to sue, but their want of capacity should be specifically made the ground of demurrer, 53 N. Y. 648. Where plaintiff, though having an interest in the subject of the suit and relief demanded, does not show a right to appear in court and demand relief in his own name, see 77 Mo. 105; 48 O. S. 559. It should be specially assigned. *Id.* The statute of limitations not raised by, 11 Bull 283. Effect of failure to demur, 50 O. S. 667, 681.

That there is another action pending, etc. This objection must appear upon the face of the petition to admit of demurrer, 7 Robt. 194; 42 Ind. 632; otherwise it must be taken by answer, 5 How. Pr. 51. It is sufficient if the other action pleaded was pending at the commencement of the suit, 21 Ind. 98. The character of the prior action is not material if full relief could have been given therein, 16 Barb. 461; but if it was for relief, which could not be granted in the action demurred to, the demurrer will not be sustained, 5 N. Y. 357; nor if the prior action is pending in the United States court or the court of a sister state, 5 C. C. 432; 31 Barb. 364; 5 How. Pr. 51. It must appear that both actions are for the same cause of action, 16 Abb. Pr. 98, and that the party demurring was a party to the former suit, 11 Hun 428, though it is not essential that he commenced it, 6 How. Pr. 279; 16 Barb. 461; contra, 41 Cal. 61.

Misjoinder of parties plaintiff. By misjoinder is meant excess of parties, Bates Pl. 67; 31 O. S. 15, 20. Misjoinder of parties defendant is not ground of demurrer, 32 O. S. 299; 31 O. S. 15; 12 O. S. 273. The objection must be taken by demurrer when it appears upon the face of the petition, 29 Cal. 637. It can not be raised by demurrer that the petition does not state facts sufficient to constitute a cause of action, 51 Cal. 511. It may be pleaded in the answer, 49 Cal. 155. It must be specific, 4 C. C. 340; 7 Colo. 477. The objection must be raised in the court below, 31 Ark. 480. The misjoinder must have existed as a ground of demurrer when the issue was made, 22 Hun 150, 157. Where plaintiff brings suit in his individual right, and also in his representative capacity, a demurrer on this ground will be sustained, 59 Cal. 293. Where there is a misjoinder of parties, it matters not that the petition makes a good cause of action against some of the parties, or against each separately, 16 O. S. 1, 8. "Where a joint right was averred in several plaintiffs, but

the facts showed a several right in one, this is not a case of misjoinder of plaintiffs, but a case of failure of proof in not showing the joint cause of action alleged; and if apparent on the face of the petition, demurrer lay, or the objection could be raised by answer, and is not waived by failure to object," *Bates* Pl. 68, citing 13 O. S. 72; 17 O. S. 323; *Id.* 183. "Where two causes of action upon contract are joined in the same action, a demurrer to the complaint upon the ground that all the defendants are not affected by both causes of action lies at the instance of the defendant so affected. The objection is not to misjoinder of parties, but of causes of action, and the rule that defendant against whom a good cause of action is pleaded must demur because too many are joined does not apply," *Bliss* Code Pl. citing 94 N. Y. 22.

That several causes of action are improperly joined. The objection may be taken by answer, § 5064; 1 H. 32; 2 W. L. M. 497. If not taken by demurrer or answer, it is waived, 1 H. 32; 10 O. S. 437; 9 C. C. 469. The demurrer must be specific, otherwise the question of misjoinder will not be regarded, 51 Cal. 431. It will lie only when a union of the causes of action is forbidden, 38 N. Y. 21; where there is a union of causes of action, to one of which is an additional though unnecessary party, 94 N. Y. 22, and though the causes of action improperly united are not separately stated, 60 N. Y. 427, the omission to state them in separate counts does not deprive defendant of the right to demur, *Id.*; 64 N. Y. 173. A demurrer for misjoinder of actions can not be defeated by claiming that the pleading fails to state more than one cause of action, 63 How. Pr. 354. It does not lie on this ground when causes of action which may have been united in one pleading, had they been separately stated, have been improperly mingled in one count, 64 N. Y. 173; the remedy is by motion, *Id.*; 29 O. S. 144; 6 Kas. 547; nor where the petition contains a single cause of action, though stated in different counts as separate causes of action, 30 O. S. 308; 13 Kas. 351; nor where the petition states a single cause of action, but asks several distinct forms of relief, all properly obtainable under the facts stated, 41 N. Y. 107. Amendment not stating cause of action, not a misjoinder, 40 O. S. 507. See 7 C. C. 154; 9 *Id.* 469.

Defect of parties. A defect is a deficiency and not excess of parties, 7 Abb. Pr. 41; 17 N. Y. 592; 12 How. Pr. 134. Demurrer will lie on this ground only where it appears from the face of the petition that there is a defect, 31 O. S. 15. Where the defect does not appear on the face of the petition, objection may be taken by answer, § 5064. The objection is waived if not taken by demurrer or answer, 14 O. S. 448; 27 How. Pr. 336. The demurrer must specify the particular defect objected to, and it is not sufficient if it follows the words of the statute merely, 13 Abb. 442; 91 Ind. 182. A demurrer that plaintiff does not state facts sufficient to constitute a cause of action does not raise the question of defect of parties, 48 Cal. 514. The party demurring must appear to have an interest in having the omitted parties joined to sustain a demurrer on this ground, 28 Barb. 602; 14 Abb. Pr. 80, or to be prejudiced by the non-joinder, 30 How. Pr. 271. But a demurrer for non-joinder is not well taken if the court can determine the controversy without prejudice to the rights of others, or by saving their rights, 5 How. Pr. 99; but if it appear that the presence of other persons is necessary, and the court can not determine the controversy without them, the demurrer

will be sustained, 7 Colo. 296. A demurrer on this ground has been held proper in an action against one of two obligors upon a joint obligation, 33 How. Pr. 80; in an action for trespass upon land held in common, where it appeared by the petition that plaintiffs were only part of the owners but it did not appear that the others were joined, 37 N. Y. 372; where a contract was made with two persons jointly, and one of them sued on it as a several contract, 50 Cal. 222; where a plaintiff brought an action to recover damages for the conversion of a chattel, and it appeared upon the face of the petition that he claimed to be owner of a third interest therein, 24 Hun 448. It was formerly the rule that a demurrer for defect of parties would not lie unless it affirmatively appeared by the pleading that the person who should have been made a party was living at the time the action was commenced, 11 How. Pr. 569; 23 How. Pr. 97; but this rule is abrogated, and a demurrer will lie now unless it appears on the face of the petition that the omitted parties are dead, 33 How. Pr. 80; 53 How. Pr. 33; see 51 O. S. 438; error, 8 C. C. 619.

That the petition does not state facts sufficient to constitute a cause of action. The objection on this ground is not waived by failure to demur or answer, § 5064. It may be taken at any stage of the case, 32 N. Y. 397, before final judgment in error; but if such objection has not been made prior to filing the petition in error, it should in some form appear in the record of the reviewing court before the case is heard, 30 O. S. 133. It may be stated in the language of the statute, 30 Cal. 666; but in demurring on account of the statute of limitations the better practice is to state the ground specifically 29 O. S. 245, 250. It lies where the petition omits a material fact necessary to the plaintiff's cause of action, 14 Abb. Pr. 282; where the action is prematurely brought, 21 Ark. 186; 11 Cal. 114; *contra*, 5 Hun 28; 19 N. Y. 271; where the facts stated do not entitle the plaintiff to the relief demanded, though they would have entitled him to some other relief had he demanded it, 29 Hun 422; where the petition fails to show any connection between the facts alleged and the party interposing the demurrer, 3 E. D. Smith 677; where a petition by several, jointly, fails to show a joint cause of action, 94 Ind. 64; 13 O. S. 72; 17 O. S. 183; where it appears on the face of the pleading that the cause of action is barred by the statute of limitations, 8 O. S. 215; 44 O. S. 12. It does not lie for a defective statement of facts, 14 O. S. 200; 30 O. S. 308; nor where the petition contains several causes of action only one of which is good, 26 O. S. 310; see 16 O. S. 1; *Id.* 455. It does not reach the question of the jurisdiction of the court, 48 O. S. 558; nor of defect of parties, 38 Cal. 514; nor of capacity of plaintiff to sue, 10 Abb. n. c. 85; nor of misjoinder of parties, 12 How. Pr. 547. It does not lie to the prayer for relief, 56 How. Pr. 452; nor the date in the verification, 5 Hun 114; nor, it seems, to the caption of the petition, 22 Kas. 729. It can not be sustained where the petition entitles the plaintiff to some relief, though not the relief prayed for, 60 How. Pr. 511; but see 29 Hun 422.

§ 5063. Demurrer must be specific. The demurrer shall specify the grounds of objection to the petition; and unless it does so, it shall be regarded as objecting only that the petition does not state facts sufficient to

constitute a cause of action, or that the court has not jurisdiction of the subject matter. [51 v. 57, § 88; S. & C. 975.]

The better practice in demurring on account of the statute of limitations is to state the ground specifically, 29 O. S. 245, 250; 44 O. S. 12.

§ 5064. When objection may be taken by answer. When waived. When any of the defects enumerated in § 5062 do not appear upon the face of the petition, the objection may be taken by answer (1); and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same (2), except only the objection to the jurisdiction of the court (3), and that the petition does not state facts sufficient to constitute a cause of action (4). [51 v. 57, § 89; S. & C. 975.]

See § 5062. 1. Where it appears in the petition in an action brought by two plaintiffs that the cause of action is not joint but several, the right to set up such defense by answer is not waived by failure to demur, 17 O. S. 823. 2. Objection to the legal capacity of a married woman to sue alone, and to defect of parties, is waived by failure to answer or demur, 14 O. S. 448. 3. 18 O. S. 521. 4. This objection may be taken advantage of at any time before final judgment in error, 30 O. S. 133; but it should appear in the record of reviewing court, *Id.*

An objection not taken advantage of by demurrer or answer deemed waived where defendant joined issue and went to trial though petition was demurrable as not stating facts sufficient to constitute a cause of action, 36 O. S. 454, 456. If there is no cause of action in existence at the time the action was commenced there is nothing conclusively waived by failure of defendant below to demur or answer, 25 O. S. 629, 635. Where a corporation, in its petition made no averment of its corporate existence and no objection was made by answer or otherwise until after judgment, the defect is waived, 40 O. S. 517. The proposition that where no objection is made by demurrer or answer on account of the defect of parties, the objection is deemed waived, applies only in cases where it is competent for the party pleading, to waive the objection. But where the presence of an absent party is essential to the determination of the controversy the parties can not waive the objection. The court in such case must order the party to be brought in, 35 O. S. 642. The bar of the statute of limitations must be set up in the answer. A general denial does not allow of the defense on the trial, 30 O. S. 184.

§ 5065. Misjoinder. When several petitions may be filed. When a demurrer is sustained on the ground of misjoinder of several causes of action in a petition or answer, the court, on motion of the party who filed the pleading, shall allow him, with or without costs, in its discretion, to file several petitions, each including such of the causes of action as might have been joined; and an action shall be docketed for each of the petitions, and the same shall

be proceeded in without further service. [51 v. 57, § 90; S. & C. 975.]

14 Kas. 130. This section applies as well where the objection to the misjoinder of causes of action is made by answer as by demurrer, 1 H. 32.

§ 5066. Demurrer to part and answer to part. The defendant may demur to one or more of the several causes of action stated in the petition, and answer as to the residue. [51 v. 57, § 91; S. & C. 975.]

But a party can not demur and answer to the same cause of action, or reply and demur to the same defense, at the same time, 6 O. S. 473; 9 O. 136; 10 O. 137.

§ 5067. Demurrer to reply. The defendant may also demur to the reply, or to a separate traverse or avoidance contained in the reply, of a defense or counterclaim, on the ground that it is insufficient in law, upon its face.

Demurrer lies to a reply when it does not support the petition. Where there is a departure, 1 C. S. C. R. 12. Failure to demur to a reply that does not contain new matter sufficient to avoid a defense does not waive the right to object to the sufficiency of the reply, 31 O. S. 492. Error in sustaining a demurrer to a reply setting up new matter sufficient to avoid a defense is ground for a reversal of judgment, unless the record shows such error to have been otherwise waived, 18 O. S. 353; but a judgment will not be reversed for error in sustaining a demurrer to a reply when plaintiff on leave files an amended reply, presenting the same issues in addition to others, and the case proceeds to trial and final judgment upon the issues thus presented, 23 O. S. 1.

§ 5068. Plaintiff may demur to answer. The plaintiff may demur to a counter-claim, set-off, or defense consisting of new matter contained in the answer, on the ground that it is insufficient in law, on its face.

An objection to the sufficiency of the answer should be taken by demurrer when it relates to matters of substance, 10 O. S. 501; but where the insufficiency consists in indefiniteness and uncertainty of statement the remedy is by motion, 20 Kas. 462; 30 O. S. 308, where the meaning can not be mistaken, 87 Ind. 84. A demurrer will not lie because of argumentativeness or surplusage, 13 Abb. Pr. 334; nor for irrelevant matter merely, 1 Duer. 242; nor because the allegations of the answer are hypothetical, 9 Bosw. 679; nor for want of verity in the allegations of the answer, 21 Ia. 441; nor because it contains inconsistent statements, 10 Kas. 298; nor where the facts are stated in the pleading as matter of belief, 13 O. S. 228; and where, in an answer seeking equitable relief, the defendant sets up a partial but not complete bar it is not demurrable, 18 O. S. 490. A defense inartificially drawn, which commingles denials and new matter, can not for that reason be held bad on demurrer if by liberal construction its allegations state a defense, 10 Abb. Pr. 362; and where the facts, if well stated, would constitute a defense a general demurrer for want of facts sufficient to state a

valid defense will not be sustained, 30 O. S. 308; and where the answer as a whole shows a valid defense a general demurrer to each of the numbered paragraphs in the answer is not well taken, 29 O. S. 341; nor where the answer contains several distinct grounds of defense and one of them is sufficient to bar the action, 16 O. S. 455; nor where different grounds of defense are improperly intermingled in one statement, 25 Wis. 703. The remedy is by motion, *Id.* A general demurrer to an answer which contains new matter and a specific denial of certain allegations in the petition should be overruled if the allegations denied are material to the plaintiff's right of action, 26 O. S. 310. A demurrer searches the whole record, and judgment will be given against the party first at fault in pleading, 10 O. S. 241; 7 O. (Pt. 1) 229. A demurrer to the reply reaches the cross-petition, 26 O. S. 652. The defendant may, on argument of demurrer, attack the petition on the ground that the court has no jurisdiction, or that the petition does not state facts sufficient to constitute a cause of action, and if it appears that the objections thus raised are well taken, the defendant will be entitled to judgment notwithstanding the defects in the answer, 32 N. Y. 397; 2 Abb. Pr. 365; 32 Hun 446; but the rule that the demurrer reaches the first defective pleading is subject to the qualification, that it is only an objection to the jurisdiction, or that the petition does not state facts sufficient to constitute a cause of action that searches the record upon a demurrer to the answer, 7 Minn. 502;

The demurrer must lie to the whole of the answer or a particular and separate defense. It can not be directed to a part of an entire defense or certain lines thereof, 4 How. Pr. 413. On demurrer to an entire defense, it is error to sustain it as to part and to strike out the remainder, 9 Minn. 356; but when the answer sets up several distinct defenses on demurrer part may be held good and the others bad, 12 Ia. 191. If a paragraph of an answer is addressed and limited to a part only of the petition, and as to that portion states a good defense, there is no error in overruling a demurrer to such partial answer, 92 Ind. 225. In an action on two promissory notes, an answer purporting to bar the action which only alleges matter in defense is insufficient on demurrer, 86 Ind. 260. A general demurrer to an answer which contains new matter and a specific denial of certain allegations in the petition should be overruled if the allegations denied are material, 26 O. S. 310.

A demurrer admits only such allegations as are well pleaded, 32 O. S. 46; it does not admit conclusions of law, 33 O. S. 384; nor allegations which it appears upon the pleadings that the pleader is estopped to make, 47 Ia. 129; nor those which are impertinent and immaterial, 86 Ind. 323; nor matters of which the court takes notice, as the enactment of public statutes, 11 Wis. 14; and where the allegations of the answer are contradictory it only admits those which the law adjudges to be true, 10 Abb. Pr. 370.

A demurrer lies to a counter-claim where the cause of action stated as a counter-claim is such that an action upon it can not be maintained by the defendant alone against the plaintiff alone, 25 Minn. 155. If the counter-claim contain irrelevant or redundant matter, the remedy is by motion, and not demurrer, 24 How. Pr. 329. Where a demurrer was interposed to a counter-claim as set up in one paragraph of the answer, it was held that defendant did not waive his exception to the ruling on the demurrer by afterwards filing an amendment to another paragraph

of his answer, in which amendment there was no reference to the counter-claim, 62 Ia. 477. On overruling a demurrer to a counter-claim, no judgment should be entered until all the issues are disposed of, 9 Hun. 633.

Judgment will not be reversed for error in sustaining a demurrer to the answer where all the averments in it were contained in an amended answer on which issue was taken, 17 O. S. 336; and judgment will not be reversed for error in refusing leave to reply after demurrer to the answer is overruled. It is a final submission unless leave is obtained to reply or amend, 24 O. S. 445; erroneously sustaining a demurrer to a good answer is not ground of reversal where the defendant amends but gets the benefit in his amendment of the averments of the original answer, 3 C. C. 228; overruling not ground for reversal when demurrant not prejudiced, 3 C. C. 620; see 2 *Id.* 321.

A demurrer is waived by voluntarily replying to a paragraph of the answer while the demurrer is pending, 92 Ind. 247; but when the answer is held bad on demurrer, the defendant does not waive his exceptions to rulings on the demurrer by amending his answer so as to set up a new defense, but such waiver follows only where the amendment is designed to supply an omission or cure a defect pointed out by the demurrer, 60 Ia. 16. Error in sustaining a demurrer is waived by setting up the same matter in the answer or reply, 17 O. S. 330; 23 O. S. 1.

§ 5069 Demurrer to counter-claim, etc., when defendant demands affirmative relief. The plaintiff may also demur to a counter-claim or set-off, upon which the defendant demands an affirmative judgment, when it appears on its face either:

1. That the court has no jurisdiction of the subject thereof.
2. That the defendant has not legal capacity to recover upon the same.
3. That there is another action pending between the same parties, for the same cause.
4. That the counter-claim is not of the character specified in § 5072.
5. That the counter-claim or set-off does not state facts sufficient to entitle the defendant to the relief demanded.

See § 5062.

SUBDIVISION IV. ANSWER.

§ 5070. What the answer must contain. The answer shall contain:

1. A general or specific denial of each material allegation of the petition controverted by the defendant.
2. A statement of any new matter constituting a defense, counter-claim, or set-off, in ordinary and concise language. [51 v. 57, § 92; S. & C. 975.]

General denial. Only facts material to the cause of action should be denied. A denial of any other facts presents an immaterial issue, and if only such issues are made the answer may be stricken out as frivolous, or the plaintiff may disregard it and take judgment, Bliss Code Pl. § 325. A general and specific denial is not permitted to the same allegation, 18 How. Pr. 240. No particular form of denial is required. "The defendant says it is not true that," etc., or "the defendant denies that," etc., is sufficient, Bliss Code Pl. § 325. A common form of general denial is that "defendant denies each and every allegation of the petition." This form puts in issue every fact alleged in the petition, 19 Abb. Pr. 288. A denial, "he says he denies," etc., though criticised, is sustained, 18 How. Pr. 240; 74 N. Y. 61. Matters of inducement averred in the reply are not the subject of denial, nor allegations of time and value when not of the substance of the issue, 7 Bosw. 670. Legal conclusions are not the subject of denial, Bliss Code Pl. § 334; as a denial of indebtedness, 5 Oreg. 86; that a note is "not outstanding," 29 O. S. 13, or "not in existence," 82 O. S. 449. "Nothing due thereon," 29 O. S. 13, "not liable," 84 O. S. 456, 457, are legal conclusions, and a failure to deny does not admit them, 81 O. S. 555. But a failure to deny a material allegation is an admission of it, 64 Mo. 165; Sham, 23 Bull. 455; and unnecessary denials, 3 C. C. 93 stricken out.

Denials must be positive and direct. A denial of each and every material allegation of the petition is not good pleading, 6 How. Pr. 312; though an answer denying all material allegations in the petition has been held good on demurrer, subject to a motion to make more definite and certain, 10 O. S. 451. A denial of "each and every allegation," etc., is sufficient, 2 W. L. M. 603; and a denial of "all averments not admitted" is good, 1 Clev. R. 218; but a denial of averments "in manner and form as stated," 1 Clev. R. 178, or a denial of "all material averments," is bad, 1 Clev. R. 123. A denial of "each and every allegation of the petition in the manner and form as therein set forth," is faulty, as only referring to the manner and form in which the plaintiff has stated his cause of action, not to the substance of the allegation, 1 Dakota 227. That "defendants do not admit," is not a good denial, 13 O. S. 263.

Negative pregnant. A denial in the precise language of the petition is not good pleading, Bliss Code Pl. § 332; as in an action for trespass in entering the plaintiff's house, the defendant pleaded that the plaintiff's daughter gave him license to do so, and that he entered by that license, and the plaintiff replied that he did not enter by her license, Stephens Pl. [281]. A denial of an act being done unlawfully, or wrongfully, does not deny the act, but only the character of it, 50 Cal. 610. A denial of wrongfully and illegally diverting a certain water is an admission of the act of diversion, 1 Mont. 212. If the plaintiff in an action of unlawful detention avers that defendant unlawfully entered upon and demanded the premises, and the answer denies that he entered "unlawfully," it admits the entry and raises an issue only upon the question of its unlawfulness, 51 Cal. 541. A denial that the property sued for is of the exact value alleged in the petition is an admission of any less value; 45 O. S. 520; fraud, see 40 O. S. 313.

Denials must be specific. Whether the denial be general or special, it must unequivocally appear what is intended to be denied, Bliss Code Pl. § 331. A denial of each and every allegation not therein expressly admitted or denied has been disapproved, and it is held that though the defect be not such as

to exclude evidence supporting the denial, the defendant will be required to make his answer more definite, 47 N. Y. 430; 111 U. S. 216. A specific denial must be certain and definite as to the fact denied. Thus a denial of the rendition of services in a certain capacity is not a denial of employment in such capacity, 42 N. Y. Superior Ct. 202; evasive, 9 C. C. 439.

Conjunctive denials do not raise any issues, and are virtually an admission of the allegations they were intended to deny, 51 Cal. 541. If several material facts are stated conjunctively in the petition, the defendant must deny them disjunctively, and not conjunctively, if he desires to put them in issue, 6 Duer. 437; 1 Abb. Pr. 187.

Inconsistent denials are not permissible under the code, and the same principles apply to answers as to petitions, with reference to the construction of inconsistent allegations in pleading, 29 O. S. 651, 655; and the court will on motion compel an election between them, 30 O. S. 600; but, "unless there is such irreconcilable repugnancy between such allegations that the verification of one is of necessity a falsification of the other," the rule does not apply, 16 Bull 400; as, in an action on a note, defendant may plead, first, that he did not sign it, and, second, if he did, the signature was obtained by fraud, 29 O. S. 78; or where the defendant denies the execution of the note and pleads want of consideration, 30 O. S. 600; where the answer contains a general denial and pleads the statute of limitations, 9 How. Pr. 57, or justification, 9 How. Pr. 288.

Argumentative denials are not, as a rule, good pleading, 6 How. Pr. 59, though they have sometimes been allowed to stand, see 35 O. S. 104, subject to a motion to make them more definite and certain, Bliss Code Pl. § 333.

Denial of knowledge or information. Defendant may deny on information and belief. A denial of "any knowledge or information concerning the matters alleged sufficient to enable the defendant to form an opinion respecting them," has been held good, 11 O. S. 183; 2 D. 223. But a denial that the pleader "knows nothing of the taking of the lien, except what he learns from the pleading," 1 H. 276, 278; and that "defendant does not know whether the copy of the instrument sued on is a true one and calls for proof," 11 O. S. 398, are insufficient; and a denial of any information sufficient to form a belief as to the truth of the matter alleged in the petition is held to raise no issue, 23 Ia. 250. The denial must be of any knowledge, as well as any information, where the statute requires it, 62 N. Y. 651; 15 How. Pr. 186. A corporation, as an individual, may deny upon information and belief, 5 Civil Proc. R. 431. In an action against a corporation, an answer which upon information and belief denies each and every allegation of the petition except the allegation of the defendant's incorporation is good, 5 Civ. Proc. R. 431; but an allegation in an answer upon information and belief that the defendant is not and never was a corporation does not put in issue the incorporation of the defendant, 8 Civ. Proc. R. 263; an answer upon information and belief admitting that both plaintiff and defendant are corporations, and denying each and every allegation of the petition is held to create no issue whatever, 33 Hun 143. But if the fact charged is within the defendant's knowledge, a denial upon information and belief is not sufficient, 14 Bull 346; Bliss Code Pl. § 326. The denial in such case must be positive, 14 Bull 346; 24 How. Pr. 133; as where the facts charged in the petition were acts alleged to be done by the defendant himself, 62 N. Y. 651; or where the acts are alleged to

be done by the defendant's agent or partner, 12 How. Pr. 37; or in the presence of the defendant, 8 How. Pr. 23. A denial on information and belief of an instrument of record well pleaded as to execution and delivery does not put these facts in issue, 41 Wis. 436. Practice of denying averments known to be true condemned, 9 C. C. 418.

What may be shown under a general denial. A party may give in evidence under a general denial anything that directly tends to disprove the allegations of the petition, 60 Barb. 346; 58 How. Pr. 480; or which goes to show that the cause of action sued on never existed, 60 Barb. 346. The true rule is that under a denial, the defendant should be permitted to show no fact that does not go to disprove the fact denied, Bliss Code Pl. § 327. In actions to recover real property, it is sufficient if the defendant denies generally in his answer the title alleged, or that he withholds possession, § 5782. Under a general denial defendant may prove any fact tending to show that plaintiff has not the title or the right of possession, 18 Kas. 508; but new matter which admits the plaintiff's title, but which shows that defendant has a right of possession notwithstanding, or that he has an equitable title, should be pleaded, 36 O. S. 357. A general denial is sufficient to raise the defense of the statute of limitations in this action, 29 O. S. 359; and where the answer denies the title alleged in the petition, other defenses in the answer are immaterial, 35 O. S. 387. In actions for the recovery of personal property, a denial puts in issue the plaintiff's ownership, and an averment that the property belongs to a third person is not new matter within the meaning of the statute, but another form of denial of plaintiff's ownership and right of possession, 22 Cal. 164. In an action for goods sold and delivered, the defendant, under a general denial, may show that they were sold and delivered to his wife, 33 Ind. 145; in an action for services, that the services were rendered upon a special agreement to look to the costs bill for compensation, 18 Barb. 29. In an action for work and labor upon a *quantum meruit*, the value of the work is put in issue under a general denial, and facts may be shown by defendant affecting such value, as negligence or unskillfulness, 4 E. D. Smith 171; 13 Cal. 640.

Accord and satisfaction must be specially pleaded, 10 Cal. 30.

Account. An allegation of the amount due on an account is material and admitted if not denied, 25 O. S. 635. In actions for the balance of an account, payment is put in issue under a general denial, 41 N. Y. 349. Under a plea of payment, the objection can not be made that the goods were wrongfully obtained and are not therefore properly the subject matter of an account, 26 O. S. 562.

Accounting. The right of the defendant to an accounting must be specially pleaded, 4 Thomp. & C. 642. An answer alleging an award is a good answer to a petition for an accounting, but it is not a departure in the reply to ask judgment for the amount of the award, 34 O. S. 294.

Account stated. A mistake or error in an account stated must be specially pleaded, 16 Minn. 91; 6 Ired. (N. C.) 192; contra, 39 Ind. 338.

Agency. In an action for goods sold and delivered, a defense that defendant purchased of plaintiff as agent of another and on his credit, plaintiff having knowledge of the agency, is sustained under a general denial, 57 N. Y. 651. Where a sale was alleged to defendant, and the proof showed a sale to defendant's agent, it was held that, under a general denial, defendant might show that the agency had been revoked and plaintiff had notice of the fact, 47 N. Y. 278. An answer to a petition on a contract of insurance, that the agent had no authority from the company

to make the contract sued on must be regarded as a denial of the averment in the petition that "the company agreed to make said insurance," 24 O. S. 345, 358, and does not contain allegations of new matter requiring a reply, *Id.*

Assault and battery. An answer "that defendant is not guilty of the grievances alleged, or any or either of them, or any part thereof," is a good denial, 41 Wis. 251. Evidence may be given in mitigation, under a general denial, 45 O. S. 177. Matters of aggravation need not be denied, 14 How. Pr. 46. A plea of *molitor manus imposuit* is not a full answer, 17 O. S. 454, and requires a reply, 2 Rec. 403; 25 O. S. 70; exemplary damages, 8 Bull 268.

Award must be specially pleaded, 1 E. D. Smith 437; 14 Ind. 32. The substance of an award must be sufficiently set forth to enable the court to say that if made the action is barred, 37 How. Pr. 88; 2 Duer. 176. Performance of an award need not be pleaded, 12 N. Y. 9. Setting aside, see 20 O. S. 231.

Bankruptcy must be specially pleaded, 38 N. Y. 253. When not pleaded it can not be assigned as error, 17 O. 362. A simple averment of discharge setting forth a copy duly authenticated is sufficient, 16 O. 12, 463. Facts showing jurisdiction to grant the discharge need not be averred, 59 How. Pr. 93; 16 O. 463.

Bills and notes. Evidence showing alteration of a note after execution is admissible under a denial that defendant made the note mentioned in the petition, see 26 O. S. 673, 676, or under a general denial, 74 N. Y. 307. An allegation that a note is fraudulently altered in a material point after delivery, without the knowledge or consent of the maker, is not necessary, as a material alteration is sufficient to avoid it, 59 Ia. 545. The answer must show that the alteration was made with the knowledge and consent or by the authority of the plaintiff, 2 C. C. R. 564; see 26 O. S. 673. A general answer of no consideration in an action on a note is good, 80 Ky. 78; but failure of consideration must be specially pleaded, 18 Ind. 300. Defendant may plead a denial of execution of the note and that there was no consideration therefor, 30 O. S. 600. An admission in the answer of the making, indorsement, and transfer does not preclude the defendant from showing that there was no consideration, 1 Hun 582. A general answer of want of consideration, and that the same was known to plaintiff when he procured the assignment of the note from the payee, is sufficient, 43 Ind. 83. Where defendant pleads that a note is wholly without consideration, and issue is joined without a statement of facts being required on which the defense is based, any evidence is admissible which tends to impeach or sustain the consideration, 15 O. S. 225. An answer averring that for a good consideration an agreement for renewal and extension of the note sued on had been made is good, though it does not allege it to have been made in writing, 77 N. Y. 64. A denial of *delivery* until after the date averred in the petition raises no issue, 20 Minn. 332. An allegation that A "made, executed, and delivered" a promissory note is not put in issue by an answer denying that he delivered the note, 5 Oreg. 22. In an action on a *destroyed note*, an answer merely denying the existence of the note when the action was brought is immaterial, 32 O. S. 449. Under a denial of *execution*, non-delivery may be shown, 48 Ind. 239, or fraud in obtaining defendant's signature, 57 Mo. 452; under a defense that defendant did not "make, sign, or deliver," that defendant's name was forged, or, if genuine, was obtained by fraud, 29 O. S. 480. Denial of execution will not sustain the defense that the note was given for a

firm debt, nor that a special arrangement for its payment was agreed on, 36 Ia. 566; or that defendant could not read nor write and did not know it was a note, 32 Ark. 327. If the defendant does not deny the execution, he must plead the special matter in discharge and an answer that a note "was not outstanding;" that "there is nothing due on the note" may be stricken out by the court of its own motion, 29 O. S. 13. An answer alleging that the note sued on was obtained by fraud, misrepresentation, and covin, without specifically setting forth the facts constituting the fraud, presents an issue of fact requiring a reply, 80 Ky. 78. An answer that the note sued on was obtained by false representations, without stating what the representations were, has been held bad, 84 Ark. 169; likewise an answer of fraud and want of consideration without averring plaintiff's knowledge, 1 Clev. R. 141, and an answer by a *guarantor* that he signed as indorser, 1 Clev. R. 219. *Illegality* must be pleaded, unless supplied by the admissions of the petition, 9 O. S. 461. An answer denying plaintiff's *ownership* is good, 1 Clev. R. 173; an answer that defendant "is ignorant as to whether plaintiff is the owner of the note sued on or indorsee, and therefore denies the same," is sufficient, 1 Clev. R. 194. Where the liability of defendant depends on whether a promissory note was an outstanding security at a certain date, an averment in his answer of *payment* prior to such date by a new note of the same maker is sufficient on demurrer, 37 O. S. 26. An answer of payment requires a reply, 25 O. S. 276.

Bond. In an action on a bond alleged to have been lost, defendant may show, under a general denial, that he never executed the alleged bond, 70 Ind. 310. In an action by a sheriff upon an indemnity bond given to indemnify him against levy and sale on execution of property claimed by a third person, the sureties may prove in mitigation under a general denial the amount received by the sheriff under the sale, 58 N. Y. 373. In an action on a bond given for faithful performance of duties, a surety may show in evidence under a general denial a settlement between the plaintiff and the principal in the bond of all demands against the latter, 75 Mo. 458. Matter in discharge or avoidance must be specially pleaded, 8 McLean 303; and the defense that a bond was illegally taken should set forth the facts constituting the illegality, 1 Gall. 86. A general plea of performance in answer to a petition assigning a particular breach is bad on demurrer, 13 Barb. 305. An answer setting up fraud in obtaining a surety on an administrator's bond is a good defense, 41 O. S. 588.

Breach of promise of marriage. Under a general denial, defendant may show in mitigation that plaintiff drank to excess and sometimes got intoxicated, 5 Abb. Pr. n. s. 29; even that plaintiff committed an act of adultery more than twenty-five years previously, 8 Thomp. & C. 424. If unsuccessful, the defense of unchastity may be matter of aggravation, 42 N. Y. 474, but not unless it is interposed in bad faith, from malice, wantonness, or recklessness, 12 O. S. 312. Defendant may show in mitigation that he was afflicted with an incurable disease at the time of the breach of promise to marry, 51 Ill. 288; but he can not defend on the ground that he was afflicted with a venereal disease, if it was contracted after the promise was made, or before, and he knew the disease was incurable, 86 N. C. 91; 41 Am. R. 444. Infancy is a good defense, 31 O. S. 521; but it is no defense that defendant was married at the time of the promise if plaintiff

was ignorant of the fact, 106 Mass. 339, or that plaintiff had previously contracted to marry another person, 18 Mo. 383.

Consideration. If a contract imports consideration as evidenced by a sealed instrument or negotiable paper, or in some states by other writings, it is unnecessary for plaintiff either to plead or prove consideration; and when defendant is permitted to avail himself of the want of it, it is new matter to be specially pleaded, Bliss Code Pl. § 330; 25 Am. Law Reg. 570, and can not be proved under a general denial, 95 Ind. 116; 58 How. Pr. 426; but in actions upon other contracts, the petition must aver or show consideration, and under a general denial defendant may prove the want of it, Bliss Code Pl. § 330; 60 Barb. 346. Illegality of consideration must be specially pleaded, 24 O. S. 615, 621; a failure of consideration must be specially pleaded, 56 N. Y. 673.

Conversion. Under a general denial, defendant may show that plaintiff had no title to the property, 14 Barb. 536; that plaintiff consented to the taking, 37 Ia. 192; that at the time of the alleged conversion the ownership and right of possession were in a third person, 6 Duer. 254; 45 Ind. 66 (but the weight of authority is that he can not show this unless he connects himself in some manner with that title, Boone Code Pl. § 137; 17 Wis. 550; 19 Fla. 42; see 20 Ia. 429. Defendant need not plead that he owned the property at the commencement of the action, nor show the source of nor mode by which he acquired title, a general denial of plaintiff's ownership being sufficient, Boone Code Pl. § 137; 8 Jones & S. 211); that defendant had a mortgage on the property, 17 Jones & S. 302; that the property was taken on execution against plaintiff, 5 Kas. 284. In an action for the conversion of a note, defendant may show, under a general denial in reduction of damages, inability of the maker to pay wholly or partially, 56 N. Y. 22, 27; that notes were never received as collateral, and that, if received, they were lost without plaintiff's fault, 24 Wis. 319. In an action for the conversion of a boat, it was held that conduct of the plaintiff amounting to an estoppel to claim title to the boat might have been given in evidence on the question of title without being specially pleaded, 66 Barb. 495.

Corporations. A general denial does not put in issue corporate existence. It must be specially pleaded when the petition does not disclose want of capacity to sue, 26 O. S. 565. Under the New York Code, the existence of a corporation need not be proved in an action by it, unless the answer is verified and contains an affirmative allegation that the plaintiff or defendant is not a corporation, Code Civ. Pro. § 1765; see 8 C. C. 311.

Damages. Under § 5081, allegations of value or of amount of damages shall not be considered as true by failure to controvert them. This does not apply to the amount claimed in contracts for the payment of money only, and in an action on an account the allegation of amount is material and admitted by failure to deny, 25 O. S. 635, 638.

Estoppel. Facts constituting an estoppel must be pleaded, 93 Ind. 570. See exception to the rule, 41 O. S. 559. The answer must show that plaintiff had knowledge of the facts constituting the estoppel, 90 Ind. 291. See 47 O. S. 385.

Executors and administrators. Plaintiff's representative capacity is put in issue by a general denial, 13 Mo. App. 114; contra, 38 Wis. 613; 60 Ia. 407. A defense by an administrator that

the claim sued on was not presented for allowance before the action was brought, should aver all the facts of publication, etc., 38 N. J. L. 161; but such defense is waived where the administrator joins issue and goes to trial on the validity of the claim without objection, 36 O. S. 454. In an action against an administrator on a note which matured more than fifteen years before the commencement of the suit, where it is alleged in the petition that before the expiration of fifteen years from its maturity the note duly verified was presented to the administrator for allowance as a valid claim against the estate, and the same was duly allowed, an answer which does not deny the fact of such allowance, but simply avers that the action was not commenced within fifteen years from the maturity of the note, is bad on demurrer, 39 O. S. 112.

Fraud must be specially pleaded, Pomeroy Rem. § 687; 27 Cal. 656; 18 Minn. 470. A general denial is not sufficient, 10 Rec. 572; 5 How. Pr. 14. It has been held that an objection to the insufficiency of the answer, for omitting to state facts constituting fraud, will not be considered on appeal if not raised in the court below, 34 Cal. 100; but where the answer omitted to state that plaintiffs intended to deceive, and defendants were in fact deceived, it was held insufficient on appeal, though no objection was made to it on the trial, 52 N. Y. 621. An answer setting up fraudulent representations in procuring a contract must state in what the representations consisted, 27 Cal. 656; that they were made with intent to defraud, 56 N. Y. 673; that defendant was deceived by them, or his belief in their truth induced him to enter into the contract, 57 Barb. 84; 13 How. Pr. 458; and that damage resulted from such false representations, 43 N. Y. Superior Court 131. "An answer of fraud must contain all the elements necessary to be proved to make out the fraud, and these are that the representation must go to the material fact; must be made under such circumstances that the party had a right to rely on it, and it must be false to a material extent," 19 Ind. 28, 29; 11 Ind. 337. An answer that a note was obtained by false representations should aver that the agent who made them knew they were false, 61 Ind. 520. Where the petition in an action against a principal for fraud committed by his agent properly states a cause of action, and avers that the fraud was not discovered until within four years before suit was begun, an answer charging that the cause of action did not accrue within four years before suit, because the fraud was not committed within such time, is insufficient, 40 O. S. 313.

Insurance. Breaches of conditions other than conditions precedent must be specially pleaded, 14 Blatchf. 422; a condition that the insured if requested should exhibit to the insurer upon adjustment of loss his books of account, etc., 45 Mo. 84; a breach of warranty, 6 Thomp. & C. 364; where a condition becomes operative only in the event of a request in writing, 46 Ind. 316, in such cases the answer must plead the conditions specially. The defense of arson must be specially averred, 37 Mich. 103. It has been held that the defense of concealment of a material fact when the application was made, which would have increased the premium, must also state that the insured knew of its existence, and that the fact was not notorious and open to all parties, 1 H. 408; but see 5 O. S. 478. An answer setting up a false statement in the application should state the particular violation claimed, 17 Hun 602.

Judgments. See ‡‡ 5090, 5310-5319. Under a general denial, defendant can not show that the judgment sued on was, subsequent to its entry, vacated by order of court, 4 Daly, 89; nor can he under a general denial attack the regularity of the proceedings on which the judgment was based, 8 Kas. 125. The only inquiry that can be made on such issue is whether such judgment was rendered and had the court jurisdiction of the parties and subject matter, *Id.* The answer may show that the judgment was obtained by fraud, 12 N. Y. 156, and in some cases though the facts constituting the fraud are not stated, 20 Mo. 494; 17 Abb. Pr. 405. So in a suit on a foreign judgment defendant may plead that it was obtained by fraud, 57 Mo. 425. The answer may set up an agreement to dismiss the suit, on which defendant relying failed to appear, 21 Ia. 58. In an action on a foreign judgment, he may plead that in the original suit he was not served with process, and that an appearance entered on his behalf was fraudulent, though such defense contradicts the recitals contained in that record, 51 Mo. 69. If defendant is served, the foreign judgment is conclusive; if not, only *prima facie* evidence, 1 O. 259; 6 O. 43. In a suit against two defendants on a foreign judgment, one of such defendants can plead want of jurisdiction in the foreign court over his co-defendant, 34 N. J. L. 286. Where a general denial is pleaded in an action on a foreign judgment, a further answer of *nul tiel* record is surplusage, 13 Ind. 83.

Justification. The facts relied on and proposed to be offered in evidence must be specially pleaded, 32 O. S. 604; 16 O. 88. The particulars must be alleged, 55 How. Pr. 55.

Libel and slander. ‡ 5094. Under a general denial, circumstances in mitigation may be proved under the code, 3 W. L. M. 100; 32 O. S. 604, as at common law, 16 O. 83; 5 O. S. 293; and it has been held that a plea of mitigating facts should be stricken out, 2 W. L. M. 437, though such facts may be pleaded in connection with a justification, 1 D. 458. A justification must be specially pleaded, and can not be proved under a general denial, 32 O. S. 604; 6 O. S. 516. The answer must state the offense of which the plaintiff is alleged to have been guilty, giving time, place, and circumstances, 28 How. Pr. 97. The plea of justification must be as broad as the charge, 1 D. 482; 5 O. S. 293; it must show specific acts, including the intent, 5 O. S. 293; W. 683; 4 Bull 61. A plea of justification is no aggravation of the wrong, unless it be used by defendant maliciously and with knowledge of its falsity, 46 N. Y. 427; but where it is made in good faith, under an honest belief of the words spoken and with reasonable ground for such belief, the plaintiff is not, by reason of such plea, on failure of proof to sustain it, entitled to exemplary damages, nor should it be regarded as an aggravation beyond the real injury sustained by plaintiff, 14 O. S. 283; see 12 O. S. 312. Mere inability to establish a justification is no evidence of malice, and will not warrant the inference of malice by the jury, 10 Daly 254. Privilege of witness, counsel, 20 Bull 186, 189, 193. Proof of truth is now good defense, ‡ 5094.

License. The defense of license must be specially pleaded, 32 Barb. 293; 81 N. Y. 52. In an action for unlawfully taking and converting property, evidence offered to justify the taking, by showing a license, is not admissible under a general denial, 32 Barb. 293; contra, 37 Ia. 192; but defendant in an action of trespass may in his answer deny the plaintiff's title, and also

plead a license to do the act complained of, the latter plea not being an admission of the plaintiff's title, 12 Minn. 426.

Malicious prosecution. A general denial puts in issue the allegations of the petition alleging malice and want of probable cause, 30 Bull 120; Pomeroy Rem. § 680; 40 Ind. 356; 12 Abb. Pr. 446; though it has been held that the grounds showing probable cause should be pleaded in the answer, 1 D. 579; 30 Bull 120. Under a general denial, defendant may show that he acted upon the advice of counsel learned in the law on a full statement of the facts, 39 Cal. 485; 6 Barb. 83; see 16 O. S. 468, 469.

Mitigation. Circumstances in mitigation may be shown under a general denial, and need not be set up in the answer, 32 O. S. 604; in slander and libel, Id.; in an action for breach of promise of marriage, 5 Abb. n. s. 29; for assault or false imprisonment 6 Bosw. 679; seduction, 25 Hun 496; for conversion of goods, 43 How. Pr. 5.

Mortgage. Foreclosure. The mortgagor may set up title in a third person named as a defense, 16 Hun 237; that plaintiff procured an assignment of the mortgage by fraud, and that the debt has been paid to the mortgagee and a release received, 57 N. Y. 643. He may set up mistake in the drawing of the mortgage and claim reformation, 47 N. Y. 487. Where the mortgage imports consideration, the want of consideration must be set up in the answer in foreclosure, unless that fact clearly appears upon the face of the petition, 65 Ala. 558. It is no defense that the mortgagor had no title to the premises, 61 Ind. 511; or that his title is defective, 29 Hun 671; or that the note secured by the mortgage was altered, 18 Hun 10; or that the mortgage is of no binding effect, and no lien upon the premises described in the petition, 7 Lans. 416.

Negligence. If plaintiff can prove his case without disclosing contributory negligence, such contributory negligence is matter of defense to be proved by defendant, 35 O. S. 627; and the petition need not deny contributory negligence, 40 O. S. 376; and where plaintiff need not deny it, it may be proved under a general denial, 20 Minn. 277, 307; contra, 5 Neb. 117, 123. Under a general denial, evidence is admissible to show that the injury was caused by other persons, not the servants or agents of defendant, 15 O. S. 211. Where one was sued for damages for negligence in opening a ditch, whereby water was let into the plaintiff's premises, it was held he might show under a general denial that the water came from a defective sewer, 14 Abb. Pr. n. s. 371. Proof of *vis major* or act of God is held not admissible unless specially pleaded, 6 Abb. Pr. n. s. 128; contra, 77 Mo. 518; S. C. Mo. 16 Bull 427. Where plaintiff averred that defendant received and agreed for a reward to transport a case of "plate" glass, which was broken through defendant's negligence, under a general denial, evidence was allowed to be introduced that it gave a receipt for "one case of rough glass," on which was plainly marked "actual contents of packages must be stated on this receipt," as showing that defendant did not receive and agree to transport plate glass, 41 O. S. 166. In an action for damages to plaintiff's goods through defendant's negligence, defendant may show under a general denial that the goods did not belong to the plaintiff, 4 Daly 329.

Ownership or title. See *supra*.

Payment. The defense of payment is new matter and must be specially pleaded, 25 O. S. 276. It can not be shown under a gen-

eral denial, except where plaintiff alleges an indebtedness generally without showing how it was created, 7 Kas. 412; or where plaintiff sues for a balance on an account or balance due for services, 41 N. Y. 349; 46 N. Y. 418, when it becomes necessary to inquire into the payments to ascertain such balance. Bliss Code Pl. § 357. In an action on an account for goods sold and delivered, a plea of payment can not be maintained when the payment is by check and the drawer has no funds in the hands of the drawee to meet it, 43 O. S. 58.

Pendency of another action should be specially pleaded, 42 O. S. 299, unless the facts appear on the face of the petition, when it must be taken advantage of by demurrer, 2 H. 69, 72. The answer must allege that the first cause was pending when the second was commenced, 57 How. Pr. 390, and is still pending at the time the answer is interposed, 2 Oreg. 49; that the parties and subject matter are the same, 27 Ark. 315, and in what court, 5 C. C. 432.

Sales. Under a general denial, in an action for goods sold, defendant may show they were sold and delivered to his wife, 33 Ind. 145. In an action for the consideration of a patent right, defendant, under a general denial, may show that the patent was not the sole consideration, but that something else was also to be conveyed, 38 N. Y. 263; in an action for goods sold and delivered that he purchased as agent upon the credit of his principal, 57 N. Y. 651; or that the authority of the agent who made the purchase had been revoked and that plaintiff knew this, 47 N. Y. 278. Where the petition avers the sale and delivery to the defendant of goods and their value, an answer which denies the indebtedness, but does not deny the facts, the sale and delivery and amount of goods does not raise an issue, as it only denies the legal conclusion resulting from the facts, 35 Cal. 462. It is a good defense to an action by a vendee for damages for failure to deliver property sold, that at the time fixed for delivery he was insolvent, 49 O. S. 41.

Services. Under a general denial in an action for work and labor upon a *quantum meruit*, facts may be shown affecting its value, as negligence or unskillfulness, 4 E. D. Smith 171; 13 Cal. 640; or that the services were rendered under a special agreement to perform them at a less sum than that claimed, 61 Ind. 368; or that they were rendered upon a special agreement to look to the costs bill for compensation, 18 Barb. 29; and in an action for attorneys' services under a general denial, defendant may show facts tending to disprove the allegations of the petition that the conditions of the contract have been performed by the plaintiff, 92 N. Y. 209, but under a mere denial of value defendant can not show that the services were not rendered, 57 N. Y. 429. A denial of the rendition of services in a certain capacity is not a denial of employment in such capacity, 42 N. Y. Superior Ct. 202. Payment can not be shown under a general denial, supra, unless as was stated the action is for a balance due, 41 N. Y. 349; nor conversion by plaintiff of the thing in respect to which the services were alleged to have been rendered, 54 N. Y. 658; nor, in an action by an officer against a city for salary, that the employment was in excess of authority, or that the fund for the payment of such salary had been exhausted, 62 N. Y. 365; nor, in an action to recover for services as broker, that the broker was acting for both parties without the knowledge of his principal, 11 Jones & S. 564; nor, in an action to recover the value of work and material, can defendant under a general denial show an express contract that the rate of compensation should be sub-

mitted to the arbitrament of a third person from whose decision there could be no appeal, 22 Minn. 267.

Specialty. See § 5071a; 48 O. S. 502.

Statute of frauds. A general denial raises the defense of the statute of frauds, 36 O. S. 331; but where the contract set forth in the petition is admitted by the answer, the statute must be specially pleaded or the defense will be waived, 46 N. Y. 223, 226; 66 N. Y. 206. Where the defendant relies on a contract which is within the statute, he must aver that it is in writing to avail himself of the defense, 31 O. S. 579. Where the agreement sued on is within the statute, and it is fairly to be inferred from the petition that it is not in writing, the defense of the statute is available on demurrer, 37 O. S. 402; see 45 O. S. 219, 543.

Statute of limitations. The statute of limitations must be specially pleaded when taken advantage of by answer, 8 O. S. 215; 23 O. S. 209; 29 O. S. 245. "The bar of the statute of limitations becomes available on demurrer only when the petition shows affirmatively that the statutory period had elapsed before the action was commenced. When this does not appear, the statute must be pleaded," 23 O. S. 209; see 44 O. S. 12. It is waived if not taken advantage of by demurrer or answer, 29 O. S. 245. A general denial waives it, 30 O. S. 184; contra, in ejectment, 29 O. S. 359. A foreign statute must be specially pleaded to be available as a bar, and such defense can not be raised by demurrer, 13 Minn. 390; see 26 O. S. 131. Such plea must state the residence of parties, 7 O. (Pt. 1) 229. If a petition properly states a cause of action for fraud, and avers that the fraud was not discovered until within four years before suit was begun, an answer charging that the cause of action did not accrue within four years before suit, because the fraud was not committed within said time, is insufficient, 40 O. S. 313; see 21 Bull 212.

Stockholder. In an action to enforce the statutory liability of stockholders, an answer that defendant "never had any stock of the said corporation in his possession, and that he never subscribed for any of said stock," does not state a good defense, 14 Bull 346, 347. An answer that defendants "deny they are stockholders of the said defendant . . . They further say that they were not stockholders in said company at the time the said notes set up in said answer and cross-petition were executed and delivered, nor were they stockholders at the time of the recovery of said judgment," set up in the petition of the plaintiff is not sufficient, as it implies that defendants were stockholders at some time, *Id.* A defense in such action that there are stockholders who have not been made parties, or paid their subscriptions, should disclose the names of such, 15 Bull 164. A defense that a creditor compromised his claim "before he obtained judgment," is demurrable, and a defense that a creditor filed his claim and asserted a lien in another case without averring its payment or allowance, is demurrable, 15 Bull 164. A sale of stock with an indemnity to the vendor against assessment on his liability is no defense, *Id.* See § 5075m.

Surety. An extension of time, to be available as a defense, must be specially pleaded, 22 Barb. 647. An averment in the answer of a surety, that he had requested the plaintiff to sue the maker under § 5333, is insufficient without a further allegation that the request was in writing, 7 O. (Pt. 1) 229; contra, 55 Mo. 31. Where one of two joint debtors has paid the whole debt, facts which rebut the presumed equity to contribute should be set up by way of defense, and need not be negatived in the petition, 26 O. S. 450, 452.

Trespass. Under a general denial, defendant may prove that plaintiff was not in possession, but that he had leased the premises, 50 Cal. 496; but it has been held, on the other hand, that a right of possession or title in a third person must be specially pleaded, 16 How. Pr. 478. Matter in justification must be specially pleaded, 11 Johns. 132, as a license, 54 Wis. 133; and if an easement is relied on as a defense by way of justification, the answer must show how the enjoyment of it was impeded, 32 Cal. 578.

Usury. The defense of usury must be specially pleaded, 87 N. Y. 430; 12 Barb. 601. It must be pleaded with such precision and certainty as to make out on the face of the pleading that a corrupt and usurious contract has been entered into, 75 N. Y. 519. The defense should state what the usurious agreement was, between whom made, and the quantum of usurious interest agreed on and received, 21 N. Y. 567; and in pleading usury laws of another state, the defense must allege what those laws were, and the facts which rendered the transaction usurious under them, 22 N. Y. 472.

‡ 5071. Defendant may state different defenses, etc. The defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off as he has, whether they are such as have been heretofore denominated legal or equitable, or both; he may claim therein relief touching the matters in question in the petition against the plaintiff, or against other defendants in the same action; and each must be separately stated and numbered, and they must refer in an intelligible manner to the causes of action which they are intended to answer. [51 v. 57, §§ 84, 93; S. & C. 968, 978.]

Joinder of defenses. There is no limit to the number of defenses which may be joined in an answer, 39 O. S. 141; 29 O. S. 78. It is not required that they must be consistent with each other, 29 O. S. 78. A denial and justification may be joined, 9 How. Pr. 289; 33 Ind. 486. A denial and the statute of limitations, 30 Cal. 192; pleas in abatement and bar may now be joined in the same answer, 21 N. Y. 399; in trespass, a denial of plaintiff's title and license to do the act complained of, 12 Minn. 426; a denial of the execution of a note and plea of infancy, 2 E. D. Smith 50. In an action for breach of contract, defendant may plead a rescission of the contract for fraud or mistake and breach of warranty, 67 N. Y. 237. A denial of the execution of a note and a plea that if the signature was genuine it was obtained by fraud may be joined in the same answer, 29 O. S. 78. Usury, extension of time, and payment are not inconsistent in an answer of a surety on a promissory note, 14 Kas. 282; nor a denial of the execution of a note and want of consideration, 30 O. S. 600. A plea of the statute of limitations and satisfaction of the demand in suit may be joined, 13 Minn. 158; but a denial of the execution of an instrument and that it was executed under duress, are held inconsistent, 16 Kas. 259; and a denial and tender, 2 E. D. Smith 197; and a denial of the taking of goods and justification under process, 5 Minn. 119; and a denial of a contract and an allega-

tion of non-performance, 11 How. Pr. 163; a plea that a contract was revoked or annulled and another that it was modified, 19 Minn. 407; a denial of forfeiture of courtesy and claim of ownership, 1 Clev. R. 117; and denial and estoppel, 1 Clev. R. 141; consideration for lease and an accounting, 27 Bull 18.

Joint answers. There is no limit to the right of proper parties defendant to join in an answer, 14 O. S. 211. An answer by one of the makers of a note inures to the others, 26 O. S. 291; and where a defense, pleaded jointly by several defendants, is bad as to one it is bad as to all, 95 Ind. 184; 10 Ia. 58.

A *partial defense* may be set up, but it must be pleaded as such, 70 Ind. 809; 15 Ia. 6; but a paragraph of an answer which is expressly limited to a part of the petition can not be declared bad merely because it goes to the whole of the petition, 99 Ind. 566. It is not necessary that an answer to a petition seeking equitable relief should set up a complete defense. It is enough that it deny or confess and avoid some material part of the plaintiff's case so as to modify or abridge the right to relief, and a demurrer to such answer raises no question of its sufficiency as a complete bar to the action, 18 O. S. 490; see 37 O. S. 363. Under the New York Code, a partial defense may be set forth in the answer, but it must be expressly stated to be a partial defense to the entire complaint, or to one or more separate causes of action therein set forth, N. Y. Code, Civ. Pro. § 508.

In an action by the payee upon a specialty the defendant may under this section allege the want or failure of consideration, and such allegation will constitute a good ground of defense, 48 O. S. 562. Cross-petition by insolvent stockholder, 35 Bull 35.

§ 5072. *Counter-claim.* The counter-claim mentioned in the preceding section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action. [51 v. 57, § 94; S. & C. 979.]

The counter claim must be founded on an existing demand *in present*, and not one that may be claimed *in futuro*, 10 Bosw. 16. The demands must be mutual, and, where plaintiff sues as an individual, a demand against him as trustee or executor can not be set up by way of counter-claim, 20 Johns. 137. It is not required that the counter-claim shall be founded on contract or arise out of the contract set forth in the petition, 15 B. Mon. 454. It is sufficient if it arise out of the transaction set forth in the petition or is connected with the subject of the action, 1 H. 434; 2 Id. 86; 40 O. S. 188; 3 C. C. 432. The words "subject of the action" are construed to mean the subject matter in dispute or the facts constituting plaintiff's cause of action, 41 How. Pr. 125. The subject of an action is either property (as illustrated by a real action) or a violated right, 61 N. Y. 226 (Dwight Com.). A counter-claim may be of a legal or equitable defense, 20 O. S. 38, for liquidated or unliquidated damages, 12 O. S. 344. A counter-claim must be *specially pleaded*, 49 Cal. 165; 2 H. 233. An answer which assumes to set up a counter-claim, or a cause of action for affirmative relief, should state all the facts necessary to constitute such counter-claim or affirmative relief as fully and specific-

ally as if the defendant were filing a petition in an original action, 6 O. S. 207, 216; 4 Duer. 285; but an answer, however unskillfully drawn, which contains necessary facts to warrant affirmative relief will be treated as a counter-claim and such relief awarded, 14 O. S. 31; and where plaintiff, without objection, takes issue upon an answer setting up a cross-demand in the nature of a counter-claim, he waives the question whether such cross-demand was the proper subject of a counter-claim, 30 O. S. 444. But the defendant is not bound to set up his counter-claim; he may elect to enforce its recovery in a separate action, 66 Barb. 35. If, however, he does plead a counter-claim, he can not, during the pendency of the action, have a separate action upon it, 69 N. C. 187, 197; but see § 5089; and it is not error to refuse to consider a counter-claim on which the defendants have already instituted an independent suit then pending, 2 Bull 110. It is too late on error to object that a counter-claim arose after the commencement of the action, 29 N. Y. 494, and the objection that a claim set up in the answer was not the proper subject of a counter-claim can not be raised for the first time on appeal, 94 N. Y. 401. Plaintiff, after an answer amounting to a counter-claim has been filed, can not dismiss the action, 14 O. S. 31; but where the allegations of an answer are not such as entitle defendant to affirmative relief, such answer does not present a counter-claim which the defendant has a right to have tried after the plaintiff's cause of action has been dismissed without prejudice, 30 O. S. 126. A counter-claim for damages can not be changed into a claim for specific performance, 1 H. 434, 437. The jury should, in assessing damages on a counter-claim, deduct the amount admitted to be due the plaintiff. In such case, the verdict ought to show it, and if the deduction is not made by the jury it will be made by the court in rendering judgment, 26 O. S. 632. Judgment will not be reversed where the court fails to give nominal damages on a counter-claim if such omission did not affect the costs or other rights of defendants, 6 O. S. 207; 26 O. S. 562; 29 O. S. 362. A justice can not rule the counter-claim out of the record because no evidence was given to support it, 6 Bull 327; see generally *Id.* 774; 3 Bull 428. In an equity case a counter-claim, though for damages, may be referred to a master, 36 O. S. 261. Statute of limitations, 48 O. S. 210.

Account. Where the dealings between the parties have been such as to entitle the defendants to a bill of account under the old practice in equity, a counter-claim may be based upon any of the items in that account, 2 H. 233.

Assessment. In an action in the name of the city for the use of a contractor to recover an improvement assessment, lot-owners can not counter-claim damages caused by the contractor, who had been licensed by such owners to dig on their premises for material, for abusing such license and digging deeper than was authorized, 1 Bull 84. It is no defense to an action for a street assessment that in improving the street private property had been taken in places where the right of way was too narrow, where the proprietors were aware of the progress of the work and took no steps to restrain it, 5 Rec. 153.

Bills and notes. Defendant may counter-claim for usurious interest paid, 16 O. S. 418. Partial failure of consideration of a note is a good counter-claim, 26 O. S. 33; but an answer to an action on a note that it was obtained by fraud and without consideration is not a counter-claim, 30 O. S. 126. In an action against a surety upon a promissory note, it was held that

defendant might counter-claim damages for a failure on the part of the payee to procure the signature of another surety as he had agreed to do, 2 Duv. 247. In an action on a note, defendant, it was held, might counter-claim for damages arising from a wrongful sale of property pledged as security for the note, 9 Wis. 348, or damages sustained by reason of a breach of a fraudulent warranty of consideration, 65 Barb. 169. Violation of agreement to sell good-will as counter-claim to action on note, 2 Bull 22. Notes given defendant for excess of his *pro rata* in composition with plaintiff's creditors can not be set off, 1 Bull 302.

Contract. In an action for compensation for the performance of a contract, defendant can not set up by way of counter-claim the non-performance of another contract, 1 H. 434, 437. In an action against a builder to recover deduction from the price paid for erecting a building and for goods sold and delivered, a counter-claim by the builder alleging violation of the building contract by permitting an adjoining owner to run up his partition wall, whereby defendant was hindered and damaged, is demurrable, 2 C. S. C. R. 66. Plaintiff can not, by an action for installments, avoid recoupment on entire contract, 3 O. S. 833.

Conversion. In an action for conversion, a cause of action upon contract is not proper as a counter-claim, 11 Abb. Pr. 210; nor in such action can defendant set up by way of counter-claim a cause of action for the conversion of certain other property, 3 Abb. Pr. 184; but in an action for the conversion of property delivered to defendant, it was held that he might counter-claim damages arising from a breach of the contract under which the property was delivered as being connected with the subject of the action, 41 O. S. 384; and where defendant was sued for the conversion of a horse he was permitted to set up the fact that the horse was sold by him in exchange for some land, that the plaintiff fraudulently deceived him in regard to its location, and to ask for a rescission of the contract of exchange, 66 N. C. 233; see 93 N. Y. 552. See *Tort, infra*.

Executor and administrator. In an action by an executor upon a demand which arose after the death of the testator, the defendant can not set off a demand against testator, although it existed at the time of his death, 6 N. Y. 168. A purchaser at executor's sale can not counter-claim for false representations of executor, 14 O. S. 276; but in an action by an executor upon a demand due his testator, false and fraudulent representations made by the latter in a sale out of which the demand arose constitute a good counter-claim, 52 N. Y. 237.

Fraud in the consideration of a deed, 2 D. 604, in action to foreclose mortgage, 40 O. S. 168, on note for price of property, 4 O. S. 680, may be set up by way of counter-claim.

Husband and wife. Where a wife sues to recover a claim for her separate estate, a debt due from her husband can not be pleaded as a counter-claim, 40 Barb. 75.

Inn-keeper. In an action against an inn-keeper or boarding-house keeper for the loss of goods upon his liability as bailee of a guest's property, the defendant may set up as a counter-claim the plaintiff's indebtedness to him for board, 9 Abb. Pr. N. S. 199.

Joint and several liability. One of two joint defendants can not interpose a counter-claim unless there can be under the pleadings a several judgment against him, 2 Abb. N. C. 216, but one

of several defendants may, by counter-claim, set up a demand due him severally, 57 Ala. 473; but a counter-claim can not be allowed to one of several defendants when it appears that another of the defendants is primarily liable for the claim demanded, 5 O. S. 520. If one defendant is sued upon an individual liability, he can not interpose a counter-claim jointly in favor of himself and another against the plaintiff, 87 N. Y. 501.

Landlord and tenant. In an action for rent, defendant may counter-claim damages arising from breaches of covenants in the lease, 56 N. Y. 420; 30 Wis. 611; 9 Bush. 708; as breach of a covenant to repair, 45 How. Pr. 340; 54 Ind. 544; the amount expended by him in necessary repairs, and damages for the loss of the use of parts of the premises rendered untenable for want of repair, 33 Barb. 401, though the covenants to pay rent and repair were separate and independent covenants, 35 N. Y. 269; 3 Mo. App. 291. In an action for rent due upon a verbal lease, defendant may show that plaintiff, by the terms of the lease, agreed to build a certain fence, and counter-claim damages arising from his neglect to build it, 49 Mo. 139. In an action by a tenant to annul a lease for fraud, the landlord may counter-claim rent accrued under the lease, 3 Abb. N. S. 467. In an action upon a lease for taking away fixtures contrary to its terms, it was held that defendant could counter-claim as for a conversion the value of certain chattels which the plaintiff would not allow him to remove, 25 Wis. 310; but in an action upon a bond for rent, where defendant sought to recover damages of the plaintiff on account of the removal of fixtures placed upon the premises by the tenant, he was not allowed to do so, as nothing had been said in regard to them in the lease, 8 Bosw. 300-S. C.; 12 Abb. Pr. 300. In an action upon a lease for rent, a counter-claim that plaintiff, through defective pipes, negligently and maliciously permitted the waste water from the upper stories to flow in upon the part occupied by defendant, and that he threw filthy water from the windows so as to run in upon the demised premises, was held bad on demurrer, 20 N. Y. 281; and where a lessor permitted rooms above those occupied by the lessee as a lawyer's office to be used for the business of printing, which disturbed the lessee and compelled him sometimes to leave his office, and broke the ceilings and damaged his furniture and books by leakage, but he did not surrender possession, it was held that he could not counter-claim the damage in an action for the rent, 90 N. Y. 293. Injury to the tenant in consequence of a change in the grade of a street can not, in the absence of any covenant in the lease protecting him from such injury, be set up as a counter-claim in an action for the recovery of rent, 65 N. Y. 1.

Mortgage. In an action by a mortgagee against a mortgagor upon a note and mortgage given for the purchase money of the premises, the mortgagor may set up a counter-claim for damages by reason of the fraud of the mortgagee in concealing from him material facts as to the situation and extent of the premises, 40 O. S. 168; 15 O. S. 145. In an action to foreclose a mortgage given to secure the purchase money on a purchase of the business and good will of a firm, breach of the contract of sale by injury to the good will may be set up by way of counter-claim, 36 O. S. 281. In an action to foreclose a mortgage for purchase money, defendant may deduct the amount of an un-

paid assessment, 80 O. S. 550; but on foreclosure a mortgagor in possession can not counter-claim for defect in mortgagee's title, 6 O. S. 207.

Partnership. In an action against partners, a several claim in favor of one defendant only can not be enforced as a counter-claim, 4 Duer. 469, and a demand against the members of a firm can not be set up as a counter-claim in an action by a member of such firm for a demand due him individually, 19 Barb. 196; but a debt due to one as surviving partner may be set off against a demand on him in his own right, and *vice versa*, 10 O. 455; 2 Bull 253.

Real property. In an action upon a note given for a farm, defendant may counter-claim damages for the improper removal after the sale of growing crops, 49 Mo. 570. Defendant in *ejectment* was allowed to set up the value of improvements against a claim for mesne profits, 30 Wis. 308. In such action facts showing that an equitable title is in the defendant, and that the plaintiff's legal title was wrongfully obtained, and should inure to the defendant, are the subjects of counter-claim, 58 Wis. 237. In an action for the possession of land founded upon the legal title held by the plaintiff, the defendant may set up as a counter-claim that he is equitably the owner of the land, and demand a specific performance or conveyance, 57 N. Y. 508. *Fraud* in the consideration of a deed may be set up as a counter-claim, 2 D. 604. A vendee who is induced to purchase land through the fraudulent representations of the vendor can counter-claim damages therefor in an action for the purchase money, 32 Ia. 437, and vendee may counter-claim for untrue representations, though honestly made, 39 O. S. 491. In a suit by a grantor to cancel a conveyance for fraud, a counter-claim denying the fraud and alleging that the plaintiff wrongfully kept the defendant out of possession, and asking judgment for possession and for rents and profits, is admissible, 27 Ind. 4. In an action for *partition*, the respective claims and rights of the parties may be put in issue and determined, and for that purpose a counter-claim may be filed, 87 Ind. 123. In an action by a tenant in common for an undivided half of a parcel of land, defendant may set up a parol partition and occupancy under it, and ask judgment that the plaintiff release, 28 Wis. 678. Where, in partition proceedings, a parcener elects to take the property, and a deed is made to him by order of court, and he omits to have the taxes discharged before taking the title, and he or his vendee has to pay them, such payment of taxes can not be set up as a lien and recouped against notes and mortgage given for the deferred payments in the partition proceedings, 2 Bull 281. In an action upon a bond given for the *purchase money* of land, the defendant may counter-claim damages for the removal and conversion of fixtures without his knowledge after the contract was made, but before the formal transfer of the land and execution of the bond, 20 Mo. 433. In an action for purchase money, the defendant may set up as a counter-claim a breach of the covenant of *seizin*, 12 Kas. 85. In an action to recover the balance of purchase money claimed to be due for land sold, the defendant may counter-claim damages for the non-delivery of possession at the time agreed, and for the removal of certain fixtures which, by the terms of the agreement, were purchased with the property, 47 N. Y. 426. In an action to recover the purchase money

on breach of a contract to convey, a subsequent depreciation in the value of the land can not be pleaded as a counter-claim, 77 Ind. 479. A grantee of land can not recoup in a suit for the balance of the purchase money, damages claimed because certain streets upon which the property was described as abutting were obstructed by another and prior grantee of the grantor, 2 H. 86. Defect of title without eviction is not a good counter-claim to an action on a note for purchase money, 6 O. S. 525; but an incumbrance on the land may be set up even against a transferee of the note without indorsement, 11 O. S. 616. A counter-claim for breach of covenant against incumbrance is defeated by proof that defendant, the vendee, agreed to pay off the incumbrance, 27 O. S. 285. Under § 5780, in an action by the vendor for purchase money, a third person holding an outstanding title must be made defendant before the defense becomes available, 28 O. S. 39. The right to bring in such third person exists only where there has been a breach of the covenants in the deed, 35 O. S. 289. In a suit for possession and to *quiet title*, the defendant may, by way of counter-claim, set up a title in equity in himself and pray to have his title quieted, 91 Ind. 301. In an action to quiet title, an answer averring possession by a valid tax sale and asking affirmative relief was held to present a good counter-claim, 19 Wis. 74. In an action to restrain *waste* and for recovery of damages for waste already done to the freehold, defendant may, by way of counter-claim, demand the specific performance of a contract to convey, 11 Abb. N. C. 93; but a demand of damages for waste is not incident to the recovery of the possession of land, and can not be properly joined in such counter-claim, 27 Ind. 4. Counter-claim for damages sustained by waste on land without the state not allowed, 88 N. Y. 258.

Replevin. In replevin by a mortgagee of chattels against an officer holding property under an attachment, the attachment creditor substituted for the officer may, by counter-claim, set up his right to relief, 20 O. S. 38. In replevin for a horse sold by defendant to plaintiff in exchange for land, defendant may counter-claim deceit as to the land, 66 N. C. 233.

Sales. In an action to recover for the price of goods sold, or on a note given therefor, defendant may counter-claim for damages sustained by fraud in the sale or breach of warranty, 57 N. Y. 16; 39 O. S. 671; 7 O. S. 95; 26 O. S. 537; 9 W. L. J. 187; 4 O. S. 680, as for a defect of quality or quantity, 26 O. S. 587; 8 Rec. 352. In an action by the buyer of goods against the seller for not completing the contract, the latter may counter-claim the price of goods already delivered, 52 Barb. 132. In an action on a contract for goods sold, defendant may counter-claim a judgment recovered by him against the plaintiff before the suit brought by the latter was commenced, 29 Barb. 296. In an action for goods, or to restrain their sale, defendant may show property in the goods, and by counter-claim recover damages for the plaintiff's interference, 29 N. Y. 494. In an action for the price of goods, a counter-claim for damages for failure to deliver, which shows that delivery and payment were concurrent conditions, must also aver an offer or readiness to pay, otherwise it does not state facts sufficient to constitute a counter-claim, 29 O. S. 362.

Services. In an action for services, where plaintiff has been discharged before the end of the term, a claim for damages for

negligent and unskillful work, is a valid counter-claim, 12 O. S. 344; and in an action to recover wages, damages caused by plaintiff's leaving the service before the end of the term of employment may be interposed by way of counter-claim, 4 Met. (Ky.) 464; in an action by a mechanic, a claim for material converted by plaintiff, 63 Barb. 500. In an action against an attorney at law for moneys received by him as such, he may counter-claim for services rendered, 53 How. Pr. 278. In an action against an employee for converting the employer's property, the former may counter-claim for unpaid wages, 72 N. C. 541. In an action for work and labor performed, a counter-claim for failing and refusing to abide by an award of arbitrators is not good, 51 Ind. 187.

Stockholder's individual liability is not a good counter-claim in his action against the corporation, 6 Bull. 428. A stockholder in a building company, sued upon his personal liability, may set up a counter-claim for advances made or liabilities incurred on behalf of the company, 11 Abb. Pr. 278. In an action by a railroad company for a subscription to its stock, defendant was allowed to counter-claim damages for a right of way through his farm, the plaintiff having agreed that the damages should go in discharge of his subscription, 18 B. Mon. 735.

Suretyship. A surety, sued upon his obligation, can not avail himself of a counter-claim in favor of his principal, against the plaintiff, 22 Hun 434; 55 N. Y. 619. In an action against principal and sureties to recover upon an undertaking, a debt due from the plaintiff or his assignor to the principal can not be interposed as a counter-claim at law, 80 N. Y. 560. In an action by a surety against a co-surety for contribution, the latter can not interpose as a counter-claim an indebtedness of the plaintiff to the principal, 57 N. Y. 649; and in an action against a guarantor of bonds, where the principal is not joined as defendant, a cause of action against the principal only can not be interposed as a counter-claim, 15 Abb. Pr. n. s. 144.

Tort. In an action on contract, a cause of action founded purely in tort, and not arising out of the transaction mentioned in the petition, can not be set up as a counter-claim, 66 How. Pr. 385; but a case of tort which the law permits the injured party to waive and sue, as on an implied contract, may be set up as a counter claim, 66 Barb. 169. In tort defendant may counter-claim for tort by plaintiff, when, 5 C. C. 51; see 45 O. S. 181, see *Conversion supra*.

Usury is not ordinarily the proper subject of counter-claim, 81 N. Y. 15; 133 Mass. 248; 98 Pa. St. 65, and can not be pleaded in an action by an assignee of a note, 4 Met. (Ky.) 58. It has been held, however, that defendant may counter-claim for usurious interest paid, 16 O. S. 417, when usury arises out of the same transaction, 23 Wis. 184; but a claim that usurious interest was paid by the defendant to the plaintiff in previous transactions is not a good counter-claim, 1 D. 18, 20.

§ 5073. Costs not recoverable in subsequent suit on counter-claim or set-off. If a defendant omit to set up a counter-claim or set-off, he can not recover costs against the plaintiff in any subsequent action thereon; but this section shall not apply to causes of action which are stricken out of or withdrawn from the answer, as

provided in §§ 5074 and 5089. [51 v. 57, § 95; S. & C. 979.]

2 C. S. C. R. 249; see 12 O. S. 621; 39 O. S. 144. 5 C. C. 438.

§ 5074. New party to be made if necessary. When it appears that a new party is necessary to a final decision upon the counter-claim, the court may either permit the new party to be made by a summons to answer the counterclaim, or may direct the counter-claim to be stricken out of the answer, and made the subject of a separate action. [51 v. 57, § 96; S. & C. 980.]

20 O. S. 38; 39 O. S. 141; 40 O. S. 468; 10 Bull 367, 371.

§ 5075. Set-off. A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of a court. [51 v. 57, § 97; S. & C. 980.]

The right of set-off depends upon statute, 1 H. 388. The code does not introduce any new rules as to the right of set-off, Id.; and the rules under the code are substantially the same as before its adoption, 1 D. 564. The right can be asserted when the cross-demands exist, in a perfect condition, between the same parties at the same time and in the same right, 1 C. C. R. 98, 100; but the code especially provides that such right shall not be defeated or impaired by assignment, §§ 4993, 5077. If, therefore, the holder of such a claim, already due and payable, assign the same, and the debtor at the time of this transfer holds a similar claim against the assignor, which is also then due and payable, he may set off his debt against the demand in the hands of the assignee, Pomeroy Rem. § 163; 31 O. S. 231. If, however, the assignment is made before the opposing demand becomes mature, and the latter does not thus become actually due and payable until after the transfer, the debtor's right of set-off is defeated by the assignment, Id.; 27 O. S. 355. But if an insolvent holder of a claim not yet matured assigns the same before maturity, and the debtor at the time of this transfer holds a similar claim against the assignor, which is then due and payable, his right of set-off against the assignee, when the latter's cause of action arises, is preserved and protected, Pomeroy Rem. § 163; see 34 O. S. 381; 16 Bull 353; 2 C. S. C. R. 33; 23 Bull 376; 50 O. S.

Account. A balance of an account may be the subject of set-off, 1 C. S. C. R. 259, as a balance of an unsettled partnership account, 26 O. S. 567; but if the items of the account have been merged in a judgment, they are not the subject of set-off, though the suit thereon was brought and judgment recovered after such cause was pending, 17 O. 156.

Assignment does not defeat an existing right, 31 O. S. 231, but defeats one not due, 27 O. S. 355. Assignment of guaranty of note before due defeats set-off, 8 Rec. 365. Debts of assignor due after assignment can not be set off against assignee, 1 H. 388; 11 O. S. 616. Assignee of judgment can not set it off against his creditor, 24 O. S. 204.

Bills and notes. Deposit in bank can not be set off against note

of depositor, 16 O. S. 296; 13 Id. 495. Indorser can not set off his liability against maker of note, 4 O. S. 586. Breach of payee's agreement can not be set off against assignee of notes, 2 Bull 304½; 6 Rec. 238. A note transferred by the holder after it is due is not the subject of set-off against the assignor, 34 O. S. 158; but the maker of a separate note in suit who holds an overdue joint note made by the plaintiff and another, who are both insolvent, may in equity set off the joint demand, 41 O. S. 408; not allowed by maker against indorser of non-negotiable note, 1 C. C. 98.

Damages for a tort can not be set off, 6 Rec. 380; 2 Bull 262; but in an action founded on contract, unliquidated damages may be the subject of set-off, 40 O. S. 186; 10 Rec. 306; see 27 O. S. 335, 338; contra, 1 H. 434; 8 Bull 35. Action sounding in tort, but founded on contract, may be set off against one for money, 9 C. C. 8.

Executors and administrators. In a suit by an administrator upon a claim of the intestate, defendant may set off any demand of his against the intestate, 6 O. S. 35; but claims originating after death can not be set off against the estate, Id.; and claims for or against the estate, originating after death, and those originating before, can not be set off against each other, W. 163; 20 O. 185. Set-off by executor against distributee not determinable in order of distribution, 32 O. S. 532; see 3 C. C. R. 479.

Foreclosure. Set-off may be allowed in foreclosure where a personal judgment is demanded, 51 N. Y. 555, but not if the action is for foreclosure merely, 17 Abb. Pr. 159.

Joint and separate claims can not be set off against each other unless equity requires it, 1 C. S. C. R. 435; 34 O. S. 381; 2 Bull 253. Joint purchasers can not set off a debt due to one of them from the seller unless one is surety, 2 Clev. R. 219; but in case of insolvency, joint may be set off against separate debts, 41 O. S. 403.

Judgments may be set off against each other on motion or in equity, 1 D. 188; W. 292; 14 O. 449; 29 Bull 197; 50 O. S.... 4 O. 90; 41 O. S. 403. A bond to two can not be set off against a judgment against one, 1 Bull 283. When judgments are set off against each other, attorney's fees are to be regarded, 37 O. S. 473.

Partners. A set-off may be allowed between partners, 2 O. 320. A creditor of a partner may set off his debt due the firm, but which had been assigned to the partner, 19 O. 126. Firm debts may be set off in an action by a surviving partner, 10 O. 455. Where a firm is sued and one member only is served he can not set off a claim due him individually, 2 Bull 253; 6 Rec. 337.

Receiver. A set-off may be pleaded in an action by a receiver, 31 O. S. 231; see 20 Bull 465; 21 Id. 136; 1 C. C. R. 524; 29 Bull 376; 50 O. S. 90.

Stockholder can not set off his claim against a corporation against his liability as stockholder, 15 Bull 164. Subscriber for stock in action for subscription can not set up payment of company's debts, made after suit, 3 O. S. 459; but stockholder's individual liability may be set off against his dividend due on deposit account with national bank, 20 Bull 465; 29 Id. 376; 50 O. S....; though the claim to the dividend has been assigned and the amount of the liability not ascertained, Id.; but stockholder's indebtedness against national bank can not be set off against claims of pledgee of stock of former who received it in pledge to secure the payment of a loan made on the faith of such pledge without knowledge of the claims of the bank or that it was insolvent, 21 Bull 193. Amount paid by stockholder on account of proposed increase of capital stock proper set-off *pro tanto* against note held against him by bank, 27 Bull 100.

Insolvency of bank dispenses with necessity of demand for payment to make claim available as a set-off. *Id.*

Suretyship. In an action on a joint debt against a principal and surety, a debt due from the plaintiff to the principal alone, may be set off, 22 O. S. 297. A surety may set off a debt paid for principal against debt due the estate of principal, W. 168, but not if paid after his death, 6 O. S. 35; surety entitled in equity to have set off against liability as acceptor of draft, the amount due his principal on deposit account with bank, 27 Bull 330; 49 O. S.

Usurious interest, under U. S. banking act 1864, can not be set off, 31 O. S. 231. When a claim is on a usurious note, and the defense is usury, with a counter-claim for overpayment by mistake, plaintiff can not prove by way of set-off that the defendant is indebted to him on distinct transactions, 16 O. S. 417.

What are not the subjects of set-off. County orders can not be set off against bond of collector, 2 O. 106; nor can contingent liabilities be made the subjects of set-off, 4 O. 354; 4 O. S. 586; nor part of a claim for unliquidated damages under justice's code, 12 O. S. 344; nor a libel against a libel, W. 681; nor right to remove fixtures against mesne profits, 8 O. 401; nor claims conditionally assigned for purposes of set off, 5 O. S. 59; nor damages for a tort, 6 Rec. 380; 2 Bull 262; nor in action on restitution bond the claim on which the original action was brought, 31 O. S. 28; nor mayor's uncollected costs against collected fines, etc., 1 C. C. R. 340; nor against claims acquired after action, 1 C. C. 524; 4 Id. 388; nor negotiable paper, 3 C. C. 94.

Miscellaneous. Set-off can not be set up in reply, except to a cross-petition, 1 C. S. C. R. 259; 16 O. S. 417. Cause not joinalbe with that in petition can not be set up in reply, 1 C. S. C. R. 259. Answer, instead of demurrer, waives objection to set-off, 1 H. 434. Estoppel may be plead against party from making set-off in violation of his agreement, 19 O. S. 356; 15 O. S. 148. Leave may be given to withdraw, 16 O. S. 417. It is governed by *lex fori*, 31 O. S. 168. The statute of limitations ceases to run against a set-off from the date of the commencement of the action in which it is pleaded, 36 O. S. 152; 48 O. S. 209; in action by state, 10 O. 91; right to exemptions not to defeat, 5 C. C. 488.

§ 5076. *Id.* **New party to be made if necessary.** If a new party be necessary to a final decision upon the set-off, the court shall permit the new party to be made, if, owing to the insolvency or non-residence of the plaintiff, or other cause, the defendant will be in danger of losing his claim unless permitted to use it as a set-off. [51 v. 57, § 98; S. & C. 981.] 41 O. S. 409.

§ 5077. **When cross-demands to be deemed compensated.** When cross-demands have existed between persons, under such circumstances that if one had brought an action against the other a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by assignment by the other, or by his death, but the two demands must be deemed compensated, so far as they equal each other. [51 v. 57, § 99; S. & C. 981.]

In suit of indorsee of past due promissory note against maker, latter may claim note compensated by indebtedness due him from indorsee intermediate between plaintiff and payee to extent that one claim equals the other, 51 O. S. 98 explaining 3 C. C. 94; see 50 O. S. 15; 2 C. C. 553.

§ 5078. **Answer of guardian and attorney.** The guardian of an infant, or of a person of unsound mind, or an attorney for a person in prison, shall deny in the answer all material allegations of the petition prejudicial to such defendant. [51 v. 57, § 100; S. & C. 981.]

17 O. S. 262, 484, 503; 23 O. S. 520; 8 O. 377.

SUBDIVISION V. REPLY.

§ 5079. **Reply. Contents.** When the answer contains new matter, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may also allege, in ordinary and concise language, any new matter, not inconsistent with the petition, constituting an answer to such new matter in the answer. [54 v. 92, § 101; S. & C. 981.]

Amendment of reply, when argument begun, not allowed in, 4 Bull 848; S. C. 8 Rec. 306.

Default for reply removed at discretion of court, 2 Clev. R. 97; 7 Bull 301.

Demurrer to reply. Defendant may demur to the reply, or to a separate traverse or avoidance of a defense or counter-claim contained in the reply, on the ground that it is insufficient in law upon its face, § 5067; but if a reply of new matter is not sufficient to avoid a defense, failure to demur does not waive the right to object to its sufficiency, 31 O. S. 492.

Departure. It is a rule of pleading that the reply can not contradict the petition, 18 O. S. 262. Plaintiff is entitled to recover only on the causes of action set out in his petition, and if he seeks to introduce new causes of action in his reply it is a departure, 16 O. S. 533; 1 C. C. R. 64, 67; see 35 O. S. 256. If there is an inconsistency between the reply and the case made in the petition it is a departure, advantage of which may be taken by demurrer, 1 C. S. C. R. 12; 2 Id. 80; as where the petition alleges a direct undertaking and the reply charges a guaranty only, 4 Mo. App. 470; where the petition alleges a committal and the reply alleges a discharge without committal, 1 C. S. C. R. 12; where the petition sets up a right as an individual to sue and the reply a fiduciary one as trustee, 2 C. S. C. R. 80. Where the answer denies the contract sued on and sets up a different one, and the reply pleads performance of the latter and asks judgment on it, the issue raised on the second contract is immaterial, 5 Rec. 372. But it is not a departure to allege additional facts avoiding a defense, and new matter not inconsistent with the petition may be set up in reply to new matter in the answer, 37 O. S. 344. Where the petition alleged ownership of stock in the plaintiff and the reply set up a special ownership as pledgee, this was held not a departure, the action being for damages against a corporation for refusing to transfer the stock on its books, 6 Mo. App. 451. Where an answer to a petition for an account sets up an award, it is not a departure in the reply

to ask judgment for the amount so awarded, 34 O. S. 294; and where the petition declares on a policy of insurance and the reply admits that the policy was written after the destruction of the property, but alleges that it was issued in pursuance of an agreement to insure made prior to the destruction of the property, there is not such a variance in the pleadings as that a demurrer will lie, 27 Bull 15. Refusal to strike out such matter is not good ground for setting aside the judgment, 1 C. S. C. R. 555. A departure is cured by verdict, 5 O. S. 88.

Form. A reply must be distinct and specific so that it may be clearly seen what is contradicted, 19 Abb. Pr. 288. An averment in the reply, that the pleader can not admit or deny the allegations of the answer, but demands proof of the same, is no traverse of the facts so alleged, and the defendant in such case will not be called on to adduce proof of the truth of his averments, 43 O. S. 427. A reply denying that anything is due the adverse party is a statement of a mere legal conclusion, and has no legal effect, 18 O. S. 353; and where the answer sets up the statute of frauds as a defense, averring that the supposed promises sued on were not evidenced by any writing, a reply denying that the promises were within the statute is a statement of a mere legal conclusion, 37 O. S. 408. The denial must be of all or any part. A denial by negative pregnant is insufficient, 29 O. S. 359.

A reply is not necessary where the answer contains only a general denial, 24 O. S. 345; where the answer denies that defendant committed the act charged, and alleges that it was committed by a third person, 15 O. S. 212; when the allegations of the answer are merely conclusions of law, 5 Minn. 302; where the answer sets up a different contract from that alleged in the petition, 35 O. S. 104; where the answer consists of argumentative denials, 9 Rec. 43; 5 Bull 523; where the answer purports to admit a certain fact not stated in the petition, 22 Kas. 110; where the new matter set up in the answer amounts to a denial, 37 O. S. 49; 4 Bull 986; where facts are stated in the answer which could have been given in evidence under a denial of the averments in the petition, 25 O. S. 134: see 19 Bull 323.

A reply is necessary in assault and battery under a plea of *motu proprio* to admit of proof of excessive force, 2 A. L. Reg. 403. Payment is such new matter as requires a reply, 25 O. S. 276. In *quo warranto* new matter set up in the answer must be replied to, 25 O. S. 279. *Res adjudicata* must be specially pleaded in reply to new matter in the answer, 44 O. S. 253; 37 O. S. 344. Set-off to a counter-claim can be pleaded in the reply, 1 C. S. C. R. 259. In an action for damages for entering plaintiff's premises and taking away certain personal property, defendant pleaded a license under the conditions of a chattel mortgage, and a reply averring that the mortgage and notes secured thereby had been obtained by fraud and misrepresentation and without consideration was held good on demurrer, 1 Clev. R. 210. A reply of settlement to a plea of usury is bad, 40 O. S. 630.

Waiver. Where the facts alleged by way of defense in the answer are not denied in the reply, and the case proceeds to trial upon the evidence as if such facts were denied without objection or exception until after the judgment of the court of common pleas has been affirmed by the district court, the judgment will not be reversed on the ground that the answer was not denied in the reply, 27 O. S. 592; 9 C. C. 201. If no reply is filed to an answer of new matter constituting a defense, but the cause is tried without objection as though such allegations had been denied, a demand for judgment on the pleadings after each party has introduced his evidence is too late, 39 O. S. 614; 41 O. S. 300.

SUBDIVISION VI. GENERAL RULES.

§ 5080. Pleading to answer asking relief. When in an answer affirmative relief is demanded against a co-defendant, such co-defendant may demur or answer thereto, as if it were a petition; and to such answer of the co-defendant a demurrer or reply may be filed, as in other cases.

5 Kas. 396.

§ 5081. What allegations are deemed to be true and what denied. Every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true; but the allegation of new matter in the reply shall be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require; and allegations of value, or of amount of damage, shall not be considered as true, by failure to controvert them. [54 v. 92, § 127; S. & C. 987.]

The presumption of law prescribed by this section as to the traverse of facts stated in the answer and the finding of court or jury upon those facts, must be held to apply only to such facts stated in the answer as are inconsistent with the petition, 9 O. S. 44. In order to put plaintiff upon proof of a material averment, the defendant must in some form deny its truth. Hence where the answer to such averment is merely "these defendants do not admit," etc., the plaintiff can not be required to offer proof in regard to it, 13 O. S. 268; nor does a mere call for proof unaccompanied by a denial impose such obligation on the plaintiff, 11 O. S. 398. In an action on a promissory note claiming a specified amount due thereon, an answer alleging payment in full sets up new matter, which must be taken as true, in the absence of a reply, 25 O. S. 276. Where judgment is rendered on default in an action on account without proof of the plaintiff's claim, there is no error for which the judgment will be reversed; the requiring of such proof on failure to answer being a matter within the discretion of the court, 25 O. S. 635. Allegation of amount due on an account after deducting all credits thereon is material and must be controverted by answer, 2 Bull 97; see 8 C. C. 416, 428.

§ 5082. What is a material allegation. A material allegation in a pleading is one essential to the claim or defense, which could not be stricken from the pleading without leaving it insufficient. [51 v. 57, § 128; S. & C. 987.]

28 O. S. 418.

§ 5083. Presumptions of law, etc. Neither presumptions of law, nor matters of which judicial notice is taken,

need be stated in the pleading. [51 v. 57, § 129.]

Judicial notice. The courts will take judicial notice of the seals of foreign states, 17 O. S. 463; of judges and terms of court, but not of the length of terms, 2 O. S. 223; 6 O. 336; 28 O. S. 554; of the day of the month at which the term of the trial court in which the action was brought commenced, 44 O. S. 430, 436; of public laws of the state, or of the United States, 33 O. S. 384, 391; 11 O. 276; of general and local laws, W. 722; 2 C. S. C. R. 178; of acts of incorporation, 11 O. 276 (see 33 O. S. 384); of canal laws of the state, W. 662; public officers, 32 Tex. 570; the signatures of officers of state, 22 Mich. 461; duties of governor, 4 Bull 282; matters of public history of the country, 37 N. Y. 174; 20 Bull 186; but not of a particular city, 1 O. 189; of winds and weather, W. 113; of permanent geographical features of the state, or of the country, 40 N. H. 420; of matters of science or art, 52 Ala. 115; 91 U. S. 37; treaties and proclamations, 9 How. 127; 16 Minn. 525. A court will take judicial notice of its own records, 16 Kas. 475; of its officers and their signatures, 66 Barb. 91; 1 Mich. 227; 14 Ia. 455. Courts will not take judicial notice of the law of another state, 40 O. S. 342; 26 O. S. 131; 2 C. C. 387, or country, 32 O. S. 163; nor of a special charter, 33 O. S. 384; nor of the population of a city by any particular census, 35 O. S. 319; nor of the contents of journals of the houses of the legislature, 3 O. S. 309, but see 45 O. S. 256; nor of the different names of a river, 29 O. S. 238; nor of the ordinances of a municipal corporation, 69 N. Y. 250 (but acts creating municipal corporations are public acts of which the courts will take judicial notice, 7 Kas. 426; 72 Ala. 411); nor of the usages of trade established by a particular board, 46 Cal. 209; nor of the customs of mining districts, 2 Colo. 424; nor private statutes, 33 O. S. 384; nor the charter of a domestic or foreign corporation, 33 O. S. 384; 22 O. S. 159; nor rules of lower court on reviewing case on error, 9 Bull 308; nor proceedings of Decennial Board of Equalization, 7 Bull 96; nor of statement in Railroad Commissioner's report that terms of statute have been complied with and name of company changed, 46 O. S. 643; courts will take judicial notice as matter of history that lands leased years ago were leased at much less than their present value, 3 C. C. 82, 84, of the existence of a municipal corporation when organized, §§ 1561, 1580, 1587 R. S.; selection and powers of acting police judge, § 1803 R. S.; facts in judge's observation in contempt proceedings, 46 O. S. 473; but not that respondent has been guilty of another contempt of the same court for which he had theretofore been tried and found guilty, Id. As to brakeman's duties see 1 C. C. 112, 116. The court in construing a statute will take notice as a matter of common observation that the majority of life insurance policies on citizens of Ohio are issued by foreign companies, 44 O. S. 613, 622.

Presumptions of law need not be pleaded, as that a statute was properly enacted, 7 O. S. 383; that a corporate seal affixed to a deed was affixed by the proper authority, 17 O. S. 571; that official acts were rightly done, 27 O. S. 311; presumptions of innocence, 12 O. S. 433; of coercion of wife by husband, 34 O. S. 127; of death from seven years' absence, 33 O. S. 155; see 41 O. S. 436; of legitimacy from being born in lawful wedlock, 30 O. S. 627; 43 O. S. 473; of the legality of a marriage, 32 O. S. 163; of delivery from record of a deed, 3 O. S. 377; that an act of an officer is legal, 3 O. 178.

5084. Substitution of copies for lost pleadings, etc. Whenever a pleading, process, return, report, verdict, bill of exceptions, order, entry, or other act, file or proceeding, in any action or proceeding pending in any court of this state, shall have been lost or destroyed, or is withheld by any person, such court may, upon the application of any party to such action or proceeding, order a copy or substantial copy thereof to be substituted. [81 v. 160; 51 v. 57, § 130; S. & C. 987.]

This section by 83 v. 207, is made applicable to justices' and mayors' courts. The substitution of copies of lost pleadings does not require notice to the opposite party, 12 Bull 184. If the pleadings are not on file the court can not compel the defendant to go to trial without ordering them replaced or supplied, W. 368. Pleadings can not be dispensed with by agreement, W. 524, except in those cases provided for the submission of an agreed case without action, 30 O. S. 120; but where the parties proceeded to trial without pleadings, no objection being taken, and there was a verdict and judgment, such irregularity was held not to be sufficient ground for reversal of the judgment on error, 11 O. S. 692; no appeal or error from order as to lost document, 81 v. 165.

§ 5085. When copies to be filed. When the action, counter-claim, or set-off is founded on an account, or on a written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading (1); and if not so attached and filed, the reason for the omission must be stated in the pleading (2). [51 v. 57, § 117; S. & C. 984.]

1. 2 H. 165; 12 O. S. 66. It is not good practice to copy the written instrument in the pleading, 27 O. S. 421. The copy attached and filed with the petition forms no part of the pleading, 29 O. S. 13; but where a copy of a policy of fire insurance filed with the petition was treated as part of it without objection, it was held not error in the reviewing court to treat the policy as part of the petition, 35 O. S. 606. In a suit on a foreign judgment, the transcript of the record should be attached to the petition, 2 H. 163, 165; 2 Rec. 392; 2 C. S. C. R. 29; Id. 154; contra, 2 D. 210; but not a city ordinance, 1 D. 479; and the transcript of a former decree for alimony attached to the petition, and marked "A," can not be considered in construing such petition, and will not in any sense supply the place of the direct and positive averments of the facts relied on, 43 O. S. 499. 2. And the sufficiency of the reason for the omission is to be decided by the court, and does not affect the merits of the action, 29 O. S. 13. The loss or destruction of the instrument is a sufficient excuse for the omission, 32 O. S. 449; 10 Neb. 524; and if the instrument is in the defendant's possession and he refuses to surrender it, 29 O. S.

13, but the fact that a note is held by a third party is not a good reason for the omission to file it with the pleading, 38 Mo. 224. The omission to attach a copy is not ground of demurrer, 12 O. S. 66. The irregularity is reached by motion, *Id.*; 13 Kas. 351; 8 Neb. 211. The omission may be waived if not objected to, 33 O. S. 308, and is not ground for reversal if not objected to below, *Id.* Instruments not attachable, see 5 C. C. 298; 16 Bull 399, 402. Date annexed to items in copy of account pleaded as set-off filed with answer not conclusive, 36 O. S. 152.

2 5086. Pleading in action on account, etc. In an action, counter-claim, or set-off founded upon an account, or upon an instrument for the unconditional payment of money only, it shall be sufficient for a party to set forth a copy of the account or instrument, with all credits and the indorsements thereon, and to state that there is due to him, on such account or instrument, from the adverse party, a specified sum, which he claims, with interest; and when others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties, it shall be necessary to state the facts which fix their liability. [51 v. 57, 2 122; S. & C. 984.]

To constitute "an account," within the meaning of this section, it is not necessary that the items be entered in an account book, provided they usually form the subject of book accounts, 12 O. S. 621. A petition on a book account, in the short form authorized by this section, is good as against a general demurrer, when the account attached to the petition consists of one or more items which are the proper subjects of a book account, and of other cash items which are not ordinarily the subjects of such account, 1 C. C. R. 23; 13 Bull 295. In an action on a promissory note, when the petition is in the form prescribed by this section, whether the plaintiff be an original party to the note or not, the extrinsic facts which show his right or title need not be expressly averred, 32 O. S. 449. A transcript of a judgment is not an instrument for the unconditional payment of money only, which may be made part of the petition by reference, 2 H. 163; nor are city ordinances and resolutions of the city council, 1 D. 479; and where the substance of an appeal bond was not set out in the petition, but a copy was annexed, and referred to as if incorporated in the petition, the instrument not being for the unconditional payment of money, it was held inadmissible under this section, 11 O. S. 398-408. A person other than the payee who brings an action against the maker of a note, payable to the order of the payee, and frames his petition under this section, without giving a copy of an indorsement by the payee, is not entitled under such petition to the protection given to a *bona fide* indorsee for value before maturity, although the note when offered in evidence appears with the name of the payee indorsed thereon, 31 O. S. 193. Where a payee, on transferring the note, writes over the indorsement a guarantee of payment at maturity, he is a party to the note within the meaning of this section, 26 O. S. 330. An action to foreclose a mortgage given to secure the amount due upon a bond, and for the sale of mortgaged premises, is not an action

upon an instrument for the payment of money only, and pleading by copy is not, therefore, allowable in such case, 7 Hun 300. And an agreement of separation between husband and wife, which contains a stipulation for the payment to a trustee of a sum for the wife's support, is not an instrument for the payment of money only within the meaning of the section, 7 Abb. n. c. 256. It is a sufficient "giving of an account" to set down in writing, in the form of an account, the items thereof, and file it with the petition, without having previously made any entries in an account book, 12 O. S. 621. An allegation of the amount due is a material allegation, which must be controverted by answer, or judgment by default may be rendered without proof, 25 O. S. 635, 638. The account annexed must be specific. A general statement by which several distinct claims are grouped together is not sufficient. The account must be as specific as the bill of particulars under the old pleading, 1 H. 559, otherwise the objection is properly taken by demurrer, *Id.*; but where the copy is imperfect, it is held the remedy is by a demand of a bill of particulars under § 5292, 2 D. 499.

§ 5087. Redundant and irrelevant matter, etc., to be stricken out. If redundant, irrelevant, or scurrilous matter be inserted in a pleading, it may be stricken out on the motion of the party prejudiced thereby; and obscene words may be stricken from a pleading on the motion of a party, or by the court of its own motion. [51 v. 57, § 118; S. & C. 984.]

The terms "redundant" and "irrelevant" are not equivalent, for although matter which is irrelevant is also redundant, the converse is not true, 5 Sand. 657. A needless repetition of material averments is redundancy, although the facts averred, so far from being irrelevant, may constitute the whole cause of action, *Id.* Matter in a pleading is irrelevant which has no bearing on the question in dispute, does not affect the subject matter of the controversy, and can in no way affect or assist the decision of the court, 53 Barb. 650; 17 Abb. Pr. 196. The term "irrelevancy" comprehends both prolixity on needless details of material matter and also matter out of which no cause of action or defense could arise between the parties, 7 Bosw. 664; 11 Abb. Pr. 435. The remedy for these defects is by motion and not by demurrer, 1 H. 40; 6 O. S. 607; 1 Bull 314. The court has inherent power to strike out scandalous and impertinent matter, 17 Abb. Pr. 188. Irrelevant matter in answer responsive to irrelevant matter in petition may be stricken out, 1 N. P. 189; but a motion to strike out such matter from the petition will not be considered after answer or demurrer, 21 How. Pr. 234, or even after an order for time to plead, 86 N. C. 4.

§ 5088. Allegations of pleading to be made more definite, etc. When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require

the pleading to be made definite and certain by amendment.

After overruling of demurrer, 9 C. C. 691.

The remedy is by motion and not by demurrer, 8 O. S. 293, 296; as where facts are stated on information and belief and not positively, 13 O. S. 228; where an answer denies all the *material* allegations of a petition, 10 O. S. 451 (but an objection to insufficiency in matter of substance should be taken by demurrer, 10 O. S. 501). An objection to the form in which facts are stated in an alternative writ of mandamus, 23 O. S. 335; and an objection that the petition of plaintiff, who sued as receiver upon a promissory note, did not sufficiently show his title, 29 O. S. 449, are raised by motion to make definite, etc.; see 46 O. S. 44.

§ 5089. Counter-claim or set-off may be made the subject of a separate action. The court, at any time before the final submission of the cause, may, on motion of the defendant, allow a counter claim or set-off to be withdrawn, and the same may become the subject of another action; on motion of either party, to be made at the time such counter-claim or set off is withdrawn, an action on the same shall be docketed and proceeded in without process, and the court shall direct the time and manner of pleading therein; and if an action be not so docketed, suit may be brought as in other cases. [51 v. 57, § 119; S. & C. 984.]

2 C. S. C. R. 258, 48 O. S. 208.

§ 5090. Pleading a judgment. In pleading a judgment, or other determination of a court, or of an officer of special jurisdiction, it shall be sufficient to state that such judgment or determination was duly given or made; and if such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction. [51 v. 57, § 120; S. & C. 984.]

The provisions of this section are confined to judgments of inferior tribunals, 2 C. S. C. R. 29, and are not intended to apply to judgments of superior courts of general jurisdiction, or judgments of courts of sister states, *Id.*; 2 H. 163; see 61 How. Pr. 272; 10 How. Pr. 532. It must be averred that the judgment was "duly given or made," 13 How. Pr. 538. An averment that a "judgment was rendered" is not an averment that it was "duly given or made," nor its equivalent, and is not sufficient under this section, 52 Cal. 407; nor is it sufficient simply to allege that "a judgment was entered," 13 How. Pr. 538.

§ 5091. Conditions precedent, how pleaded. In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly

performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance. [51 v. 57, § 121; S. & C. 984.]

A general allegation of performance is sufficient, 1 H. 239; 27 O. S. 421; 33 O. S. 555; 24 Bull 29; as in pleading a condition on a policy of insurance, it is sufficient to aver that "plaintiff has performed all the conditions on his part to be performed," 33 O. S. 555; 6 C. C. 3, and if the petition does not allege performance of such condition or a waiver of performance on the part of the insurer, it is bad on demurrer, 26 O. S. 348; so, in an action on a note, averments that payment "was duly demanded at maturity," and that it "was duly protested for non-payment," and that "notice thereof was duly given," are sufficient averments of the performance of conditions precedent, 18 Wis. 277. It is sufficient to allege the performance of the condition in the language of the condition, 16 Gratt. 295; but an allegation that a contract "has been a valid and subsisting contract ever since the date of its execution, and is still a valid and subsisting contract ever since the date of its execution, and is still a valid and subsisting contract, and binding on the said —," is not sufficient, 14 O. S. 308. This mode of pleading is confined to conditions on contract, 52 Cal. 350, and includes as well express conditions precedent as constructive and implied conditions, 27 O. S. 424; 3 W. L. M. 628.

§ 5092. **Pleading private statutes.** In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its passage. [51 v. 57, § 123; S. & C. 984.]

Courts can not take judicial notice of private statutes, unless specially pleaded, 33 O. S. 384; contra, 11 O. 276; 2 C. S. C. R. 178; and in pleading such statutes, they must at least be referred to by their title and the day of their passage, 33 O. S. 384. A city ordinance must be specially pleaded, 69 N. Y. 250; 4 Bush. 440; and a mere reference to it by number and date, it is held, is not sufficient, 9 Oreg. 363; but a city court may properly take judicial notice of a city ordinance, 11 Ia. 407. A foreign statute, 32 O. S. 163; 40 O. S. 342, or the statute of another state must be specially pleaded, 26 O. S. 131, or the charter of a foreign corporation, 22 O. S. 159. It is the safest course, when pleading a statute sanctioning a defense, to follow the words of the statute, 10 How. Pr. 515. Public domestic statutes need not be set out or even referred to in the pleading since the courts will take judicial notice of their existence and terms, 15 Wend. 111.

§ 5093. **Libel and slander.** In an action for a libel or slander, it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff; if the allegation be denied, the plaintiff must prove the facts, showing that the defamatory matter was published or spoken of him; and in such action it shall not be necessary to set out any obscene word, but it shall be sufficient to state its substance. [51 v. 57, § 124.]

Privilege of witness, 20 Bull 186; of counsel, Id. 189. State-

ments in pleadings privileged, Id. 193; see 4 C. C. R. 15. Report of judicial proceedings, 29 Bull 264; 50 O. S. See 81 Bull 111.

§ 5094. Id. Truth of matter and mitigating circumstances. In the actions mentioned in the preceding section the defendant may allege and prove the truth of the matter charged as defamatory, and the proof of the truth of the matter so charged as defamatory shall be a good and sufficient defense against any claim for damages; and in every case the defendant may prove any mitigating circumstance to reduce the amount of damages. [90 v. 324; 51 v. 57, § 125; S. & C. 985.]

It may be shown, in mitigation, that the reputation of the plaintiff, a female, for chastity was bad, where the slanderous words charge a want of chastity, 32 O. S. 604; but specific acts of sexual intercourse by her can not be given in evidence for any purpose under an issue made by a general denial, Id. It may be shown in mitigation, that defendant, when the words were spoken, named his author, and that such third person had spoken the words, 7 O. (Pt. 1) 253; that plaintiff's wife, against whom the words were spoken imputing a want of chastity, and an unmarried man had lived together alone in one house, 6 O. S. 516; see § 5070; 21 O. S. 536; 40 Id. 201; 42 Id. 631; 6 Bull 271; 21 Bull 93, 292. Where the defense to an action for libel is that the publication was privileged and issue is joined upon the allegations of fact on which the alleged privilege depends, the issue is for the jury and a refusal to instruct them that the publication was privileged, is not error, 29 Bull 264; 50 O. S....

§ 5095. Real property. How described. In an action for the recovery of real estate, the property shall be described with such certainty as will enable an officer holding an execution to identify it. [51 v. 57, § 126; S. & C. 986.]

§ 5096. Pleadings to be liberally construed. The allegations of a pleading shall be liberally construed, with a view to substantial justice between the parties. [51 v. 57, § 114; S. & C. 983.]

8 O. S. 215, 218; 10 O. S. 621; 14 O. S. 417, 422; 38 O. S. 314; 39 O. S. 57; 43 O. S. 78.

§ 5097. Rule days for pleading. The answer or demurrer by the defendant shall be filed on or before the third Saturday, and the reply or demurrer by the plaintiff on or before the fifth Saturday, after the return day of the summons, or service by publication; and the answer or demurrer of a defendant to a cross-petition shall be filed on or before the third Saturday, and the reply or demurrer thereto on or before the fifth Saturday, after the cross-petition is filed. [51 v. 57. § 103; S. & C. 982.]

In cases appealed from a justice of the peace, see § 6598. In *quo warranto*, § 6772; 11 Bull 294. It is too late, on error, to object to the filing of a demurrer to a petition after rule day, 44 O. S. 12; 15 Bull 103. The plaintiff against whom an answer "demanding affirmative relief" is filed is "a defendant to a cross-petition," and this section gives him until the "third Saturday after the cross-petition is filed" to plead it. A judgment taken by such defendant before such third Saturday, without the knowledge of the plaintiff, is obtained by "irregularity," and should be set aside by a proceeding under §§ 5354-5365, 40 O. S. 344; see *Id.* 485. Time for filing answer to amended petition in discretion of court. Setting case for trial on specified day is in effect an order that the issue be made up by that time; 30 Bull 52; 50 O. S. 394.

§ 5098. Rule day may be extended. The court, or a judge thereof in vacation, may, for good cause shown, extend the time for filing any pleading, upon such terms as are just. [51 v. 57, § 104; S. & C. 982.]

1 H. 290; 4 Bull 958, S. C. 8 Rec. 352; 15 Kas. 242; 6 Neb. 351. The defendant is not excused from filing his pleadings within the rule because the plaintiff has failed to comply with an order to give security for costs, 18 O. 240. It is discretionary with the court to receive or reject the statute of limitations after the rule day for pleading has expired and the party is in default, *Id.* Where the court gave leave to file a petition within sixty days, and, in default, ordered that the case stand dismissed, and a petition was filed two days after the expiration of the sixty days, the defendant, after answer, trial, and judgment, can not insist on the dismissal, 10 O. S. 621.

§ 5099. Interrogatories may be annexed to a pleading. A party may annex to his pleading, other than a demurrer, interrogatories pertinent to the issue made in the pleadings, which interrogatories, if not demurred to, shall be plainly and fully answered under oath, by the party to whom they are propounded, or if such party is a corporation, by the president, secretary, or other officer thereof, as the party propounding requires. [70 v. 54, § 105.]

Interrogatories authorized by this section must be confined to matters stated or referred to in the pleadings, 4 W. L. M. 144. If it is irregular to insert interrogatories in pleadings, the irregularity should be taken advantage of by motion, and is waived by demurrer, *Id.* Interrogatories which could have been attached to the petition will, on motion, be stricken out of the reply, *Id.* 146.

§ 5100. When interrogatories to be answered. When annexed to the petition, the interrogatories shall be answered within the time limited for answer to the petition; when annexed to the answer, they shall be answered within the time limited for a reply; when annexed to the reply, they shall be answered within the

time allowed for an answer; but further time may be allowed in all cases by the court, or a judge thereof in vacation. [70 v. 54, § 105.]

§ 5101. **How answers may be enforced.** Answers to interrogatories may be enforced by non-suit, judgment by default, or by attachment, as the justice of the case may require; and, on the trial, such answers, so far as they contain competent testimony on the issue or issues made, may be used by either party.

Power to enforce discretionary, 4 C. C. 307; 44 O. S. 610. An order of court that interrogatories attached to a pleading be answered on or before a certain time and in default thereof that the action stand dismissed does not execute itself and the action continues on the docket until dismissed by the court, 29 Bull 76; 49 O. S. 681.

§ 5102. **Pleadings to be subscribed and verified.** Every pleading and motion must be subscribed by the party or his attorney, and every pleading of fact, except as provided in the next section, must be verified by the affidavit of the party, his agent or attorney; when a corporation is the party, the verification may be made by an officer thereof, its agent or attorney; and when the state, or any officer thereof in its behalf, is the party, the verification may be made by any person acquainted with the facts, the attorney prosecuting or defending the action, the prosecuting attorney, or the attorney-general. [52 v. 22, § 106; 70 v. 54, § 105; S. & C. 982.]

See § 213. The verification is no part of the pleading, 6 How. Pr. 200, and is not necessary to vest jurisdiction, 2 Neb. 136. Its omission may be supplied, 2 C. S. C. R. 30; 2 W. L. M. 548; contra, 1 W. L. M. 394; and if defective, it may be amended, 3 W. L. M. 604; 16 How. Pr. 129, without requiring the issuing of a new summons, Bates Pl. 253, citing 2 W. L. M. 812; contra, 2 C. S. C. R. 30; 3 W. L. M. 604; Id. 894; 2 Id. 548. The objection to such omission is by motion to strike from the files, 2 W. L. M. 548; Id. 602; 3 Id. 604; 11 Kas. 121; 6 Neb. 435. A defective verification is waived by pleading over or demurring, 3 W. L. M. 604; 62 Ind. 179; when no objection is made until after rendition of judgment, 8 Neb. 214; where a warrant of attorney to confess judgment authorized a release of all errors, 31 O. S. 435. The want of a verification can not be raised on the trial, 74 N. Y. 807; nor for the first time in a reviewing court, 29 Ark. 500. A failure to sign the affidavit of verification is not ground for dismissal of the action, but the practice is to file a motion to strike the petition from the files, 6 Neb. 435. A failure to subscribe the pleading is not ground for reversal of judgment, no advantage of the defect having been taken at the proper time, 26 O. S. 644. The signature, it is held, may be printed instead of written, 49 Cal. 413; and the court is not bound to try the question of the genuineness of the signature, 30 Cal. 192. The verification, it has been held, need not state the venue, 2 W. L. M. 588; see 43 Ia. 605; 18 Minn. 90 cf. 6 How. Pr. 394; 7 Neb. 146. The verification of an insufficient pleading will not aid it, 1 Minn. 241; nor prevent its

being stricken out as sham, 13 Minn. 165. Additional matter in verification treated as surplusage, 38 O. S. 657. Corporation, 2 N. P. 260.

§ 5103. When verification not required. The verification mentioned in the preceding section shall not be required to the answer of a guardian, defending for an infant, or a person of unsound mind, or the attorney of a person imprisoned; nor in any case where the admission of the truth of a fact stated in the pleading might subject the party to a criminal or penal prosecution. [51 v. 57, § 107; S. & C. 982.]

It is not necessary in divorce or alimony cases, § 5697; nor in petitions in error, 9 Neb. 502, unless they contain issuable facts, 35 O. S. 244; nor "where the admission of the truth of a fact stated in the pleading might subject the party to a criminal or penal prosecution," 31 Hun 563.

§ 5104. When one of several parties may verify. If several parties are united in interest, and plead together, the affidavit may be made by one of them. [51 v. 57, § 108; S. & C. 982.]

1 N. Y. Law Bull. 29. But all parties not united in interest should verify, 10 Abb. Pr. 66; 5 Bosw. 666; 14 How. Pr. 305. If the action is defended for the immediate benefit of one not a party to the record, and he is a party in interest, the pleading may be verified by him, 6 Abb. Pr. n. s. 147; and unless the wife is a mere nominal party, she should join with the husband in the verification, 12 How. Pr. 395.

§ 5105. Sufficiency of affidavit. The affidavit shall be sufficient if it is stated therein that the affiant believes the facts stated in the pleading to be true. [51 v. 57, § 109; S. & C. 982.]

11 O. S. 183, 188. A verification that affiant is informed and believes plaintiff is absent from the county is insufficient, 2 W. L. M. 602.

§ 5106. Verification by non-resident. When the party pleading is a non-resident of the county in which the action is brought, or is absent from the county wherein the pleading is filed, an affidavit made before filing the pleading, and filed with it, stating the substance of the facts afterwards inserted in the pleading, shall be a sufficient verification [51 v. 57, § 110; S. & C. 982.]

See 1 W. L. M. 199; 10 Kas. 112.

§ 5107. Affidavit of verification to be signed and certified. The affidavit verifying a pleading may be made before any person before whom a deposition might be taken, and must be signed by the party who makes it; the officer before whom the same was taken shall certify that it was sworn to before him and signed in his pres-

ence; and the certificate of the officer, signed officially by him, shall be evidence that the affidavit was duly made, that the name of the officer was written by himself, and that he was such officer. [51 v. 57, § 111; S. & C. 983.]

"Subscribed and sworn to before me" a sufficient form, 2 D. 472. "Subscribed before me" equivalent to "subscribed in my presence," Id.; 3 Law Gaz. 252. The affidavit may be made before the clerk of the supreme court or common pleas, whether the pleading be used in the county where it is verified or in any other county of the state, 1 W. L. M. 210. It can not be made before the attorney of the party as notary public, 2 W. L. M. 312; 51 How. Pr. 205; 11 Kas. 123; contra, 6 Bull 289.

§ 5108. When verification applies to amount claimed. The verification of the pleading does not apply to the amount claimed, except in actions founded on contract, express or implied, for the payment of money only. [51 v. 57, § 112; S. & C. 983.]

An allegation of the amount due on an account is within the exception of this section, and must be controverted by answer, 25 O. S. 635, 638. In actions founded on contract the verification does not *prima facie* embrace or determine the amount of recovery, and it is error to enter judgment thereon without evidence of amount or value, 2 C. C. R. 143.

§ 5109. Affidavit by agent or attorney. The affidavit verifying a pleading can be made by the agent or attorney only:

1. When the facts are within the personal knowledge of the agent or attorney.

2. When the plaintiff is an infant or of unsound mind or imprisoned.

3. When the pleading to be verified is founded upon a written instrument for the payment of money, and such instrument is in the possession of the agent or attorney.

4. When the party is not a resident of, or is absent from, the county. [51 v. 57, § 113; S. & C. 983.]

1. 2 W. L. M. 602; 4 W. Law Gaz. 404. 3. 3 W. Law Gaz. 246; but a petition in an action on a mortgage, it was held, could not be verified by an agent or attorney, 31 O. S. 168; 3 W. L. M. 604; verification of pleadings in partition, 25 Bull 78.

§ 5110. Pleading not to be used against party in criminal proceeding. A pleading, verified as herein required, shall not be used against a party in any criminal prosecution or action or proceedings for a penalty or forfeiture, as proof of a fact admitted or alleged in such pleading; and such verification shall not make other or greater proof necessary on the side of the adverse party. [52 v. 22, § 106; S. & C. 982.]

SUBDIVISION VII. MISTAKES AND AMENDMENTS.

§ 5111. Amendment of petition before answer. The plaintiff may amend his petition without leave, at any time before the answer is filed, without prejudice to the proceeding; but notice of such amendment shall be served upon the defendant or his attorney; and the defendant shall have the same time to answer or demur thereto as to the original petition. [51 v. 57, § 134; 8. & C. 989.]

Amendments without leave will be allowed to almost any extent, provided the facts alleged by way of amendment are only such as serve to explain or perfect the cause of action already presented, 9 How. Pr. 140. The real limitation seems to be that the amendment will not bring a new cause of action, 70 N. Y. 190; but it is held a pleading may be amended, of course, by adding a new and distinct cause of action or defense, 22 How. Pr. 229, provided the new cause of action be not inconsistent with the one stated in the original petition, 41 Barb. 54; by striking out one of the causes of action, 15 Abb. Pr. 51; by changing the place of trial, 28 How. Pr. 20; by striking out the plaintiff and inserting the real party in interest, 1 H. 236; but in an action against a firm in its firm name, a pleading substituting the individual members requires a new summons, 2 D. 586. A pleading can be amended without leave but once in the whole course of the action, and if a party deems it important to amend a second time he must apply to the court, 30 How. Pr. 1; but his right to amend without leave is not lost unless the change in the pleading amounts to an amendment in fact, 1 Duer. 629, and the fact that portions of the pleading are, on motion, struck out as irrelevant and redundant can not be considered an amendment within the meaning of the code provision on the subject, 20 How. Pr. 328. Adding a verification to a petition is not an amendment, 6 How. Pr. 200; and a change of parties has been held not to be amendment of pleadings, 6 Abb. Pr. 213. An amended pleading supersedes the original, and the original ceases to perform any other functions as a pleading, 12 How. Pr. 521; see 11 C. C. 153; and where the answer to an amended petition does not make the original answer a part thereof, the issues made by the original answer will be disregarded, 80 O. S. 555. An amendment of the petition relates back to the commencement of the action, which dates from the filing of the original petition and issuing of summons thereon, 33 Cal. 497, and may therefore prevent the statute of limitations from barring a cause of action not included in the original, 21 How. Pr. 283; but see 21 Bull. 319; 46 O. S. 373; but where the plaintiff in a real action, omits to describe in his petition, all the lands detained from him by the defendant, he can not, by an amendment to his petition made after the statute of limitations has run as to the land omitted, include such omitted land and have the amendment relate to the filing of the petition so as to defeat the plea of the statute as to the lands brought in by the amendment, 46 O. S. 373. Where a petition for an amount due on an account is filed in proper time within the statute and subsequent to such filing the petition is amended, and in the amended petition there is no change in the time, time is computed to the filing of the original petition, 41 O. S. 145.

§ 5112. **Amendment after demurrer.** At any time within ten days after a demurrer is filed, the adverse party may amend, without leave, on payment of costs since filing the defective pleading; and notice of filing an amended pleading shall be forthwith served upon the other party, who shall have the same time thereafter to answer, or reply thereto, as to an original pleading. [51 v. 57, § 135; S. & C. 989.]

This section refers to amendments without leave of court, but not to amendments made in open court by leave of court, 8 Neb. 445.

§ 5113. **Answer or reply after demurrer overruled.** When a demurrer is overruled, the party who demurred may answer or reply, if the court is satisfied that he has a meritorious claim or defense, and did not demur for delay. [51 v. 57, § 136; S. & C. 989.]

Defendant may be required to plead instanter, 9 Neb. 310.

§ 5114. **Amendment of pleading, process, or proceeding.** The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved; and when an action or proceeding fails to conform to the provisions of this title, the court may permit the same to be made conformable thereto by amendment. [51 v. 57, § 137; S. & C. 989.]

General remarks. Changing cause of action. The allowing or refusing amendments, except those without leave, is a matter resting largely in the discretion of the court, the exercise of which will not be reviewed on error except in cases of abuse, 20 O. S. 128. An abuse of discretion will not be presumed, 16 Neb. 673. The record must show affirmatively that the discretion was abused, 20 O. S. 128, 135; 25 O. S. 609. It is an abuse of discretion to allow the filing of an amended petition that does not state a cause of action, and an order allowing such petition to be filed may be reversed on appeal, 61 Wis. 31; so the discretion of a referee in denying an amendment will be reviewed and his decision reversed when general justice will be promoted and future litigation thereby prevented, 16 Jones & S. 46. In actions between individuals, it is not an abuse of discretion to allow or refuse the defense of the statute of limitations by amendment, 61 Wis. 222, or to refuse an amendment which is a substantial repetition of a former pleading, 14 Ia. 57, or one setting up a new cause of action, 2 W. L. M. 437. Two tests are given by which

to determine whether a second petition is an amendment or a substitution of a new cause of action: 1, that the same evidence will support both petitions; 2, that the same measure of damages will apply to both, 69 Mo. 170; 79 Mo. 419. If both these tests fail, the new pleading is not an amendment, 79 Mo. 449; as where the first petition was in trover for certain goods and the second charged that the defendant had maliciously sued out a writ of attachment and caused the goods to be seized and sold at a sacrifice, it was held that the latter stated a new and distinct cause of action and was not an amendment, *Id.*; but an amendment merely changing the form of the action is not a substantial change of the claim within the meaning of the statute, 7 Bull 15, 301; as an amendment changing a petition for money to a demand to subject separate property of married woman, 7 Bull 15; a petition alleging a special to one setting up a general partnership, 7 Bull 301; a petition for false imprisonment to one for malicious prosecution, 3 Bull 1139, and *vice versa*, 14 O. S. 213; a petition in law to one in equity, 4 W. L. M. 153; an action in case to one in trespass, 6 O. 388; and changing the prayer of the petition is not a substantial change of the action, 1 Clev. R. 115; 2 C. S. C. R. 167; but a claim for money had and received can not be changed to one for conversion, 1 Clev. R. 17; and an amendment substituting specific performance for damages, will not be allowed as a matter of course, 1 H. 434. After service in attachment, a petition can not be amended so as to set up a new cause of action, 1 H. 573; or enlarge the scope of the attachment, 2 C. C. R. 110. In allowing amendments to answers, the court does not now regard the character of the defense sought to be introduced, 10 Hun 109, as it did formerly before the adoption of the code, Bliss Code Pl. § 431. Any defense, though unconscionable in its nature, as the statute of limitations or usury, may be set up by way of amendment, 41 Barb. 337; 13 Abb. Pr. 268. "Whatever may have been the earlier doctrine on the subject of what were called unconscionable defenses, it no longer prevails. The rules which govern amendments are now to be regarded without reference to the character of the defense," 17 N. Y. Supreme Co. 109.

How made. An amendment can not be made by mutilating or altering the files. A new pleading should be filed, or a statement of the amendment designating by reference where the new matter is to be inserted, or what is to be considered as stricken out, 10 O. S. 621. But where the alteration is made by striking out or inserting new matter in the original pleading, with the permission of the court, and no prejudice results to the adverse party, the final judgment will not be reversed therefor, 21 O. S. 98; 4 Bull 910; 8 Rec. 357.

Amendments allowed in affidavit in attachment, 23 O. S. 192; 2 D. 505; but after service in attachment the court will not allow the petition to be amended setting up a new cause of action, 1 H. 573, 574, and in an attachment against a non-resident firm the court will not allow the process to be amended without prejudice to the attachment by inserting the individual names of the defendants, *Id.* An appeal bond may be amended, 6 O. S. 81; 35 O. S. 638; 7 C. C. 348, by the insertion of omitted conditions, 31 O. S. 131; see *Id.* 331¹; and in an action on a bond after reversal of judgment the court, to which the cause has been remanded for further proceedings, may, by way of amendment, allow breaches to be assigned on the bond which were not assigned in the orig-

¹ 4 C. C. R. 35.

inal petition, 25 O. S. 620. *Court may sua sponte* require a pleading to be amended, 20 O. S. 62, 63. An *execution* may be amended, 19 O. S. 67, 104, and amendments are allowed in *mandamus*, 23 O. S. 335; 4 O. S. 493; § 6751. A *motion to vacate a judgment* may be amended, 9 O. S. 505; 10 C. C. 395. A *new cause of action* can not be set up by way of amendment, 2 W. L. M. 437; but it is immaterial if it is insufficient, 40 O. S. 507. The form of the action, however, may be changed, 7 Bull 15, 301; 3 Id. 1139; 14 O. S. 213. An amendment will be allowed by striking out the name of a nominal party and inserting that of the real party plaintiff, 1 H. 236; 2 H. 67; in cases of misnomer, 1 H. 191; such defect, unless pleaded in abatement, is disregarded, 36 O. S. 296. *Prayer for relief* may be changed, 2 C. S. C. R. 167. On petition in error the district court may order the common pleas to send up a perfect transcript of its record, but has no power to order an amendment of the record, 15 O. S. 295. Amendment of record after proceedings in error, 9 O. S. 526. *Sheriff's return* amendable 4 O. 49, 59, 60; 8 O. S. 322; 10 O. S. 77; but not so as to prejudice intervening rights, 30 O. S. 344; 13 O. 220. *Summons*, 1 H. 95; 26 O. S. 467. *Undertaking for second trial*, 28 O. S. 90. Amendment of reply at trial, setting up insanity to defense of suicide, refused, 4 Bull 348; 8 Rec. 306. *Verdict* not amendable, 9 O. 131. *Verification of pleading* amendable, 3 W. L. M. 604.

Amendments on appeal. The allowance or refusal of amendments on appeal is addressed to the sound discretion of the court, and its ruling thereon is not reviewable except in cases of manifest abuse of discretion, 25 O. S. 609. After demurrer sustained on appeal, a party may ask leave to amend, 29 O. S. 440; and where facts necessary to determine the original cause of action have been omitted in the pleadings below, or the cause of action imperfectly stated, amendments on appeal have been allowed, 8 O. 32. So, where the facts require it, new parties may be brought in on appeal by amendment, Id.; 12 O. S. 11, 33; see 20 O. S. 38; but an amendment setting up a new and different cause of action will not be permitted on appeal, 8 O. S. 32; 30 O. S. 365; and an amendment on appeal from a justice of the peace will not be permitted increasing the claim beyond a sum within his jurisdiction, 21 O. S. 659; or substituting another cause of action—from money paid for the use of another, etc., to one founded upon a covenant against incumbrances in conveyance of real estate—not within his jurisdiction, 49 O. S. 530, 535. A making of an undertaking payable to the state of Ohio instead of to the adverse party under section 6408 is such a mistake as may be corrected under the provisions of this section, 7 C. C. 348.

Defects cured. Under the code where a material fact is stated in a pleading, but stated defectively, the defect will be cured by a verdict or finding without the necessity of an amendment. "Every reasonable presumption and fair constructive intentment will be made to sustain the pleading after verdict," 7 O. S. 270; 11 O. S. 393; 30 O. S. 133; but this rule is subject to the qualification that the facts, when well stated, will constitute a cause of action, 11 O. S. 393. The objection that the petition does not state facts sufficient to constitute a cause of action may be made at any time before hearing on error in the reviewing court, 16 O. S. 118, 128; 30 O. S. 133; and such a defect is not cured by verdict, 10 O. S. 567. But where there is otherwise a

good cause of action, though defectively stated, the defect may be cured by the pleading of the opposite party. If the answer avers or confesses a material allegation omitted in the petition the defect in the petition is thereby cured, 9 O. S. 43; 9 O. S. 461; 33 O. S. 555; 2 O. 197; 24 O. S. 345, 357. The defendant is entitled to the benefit of admissions in the petition to sustain a defective answer, 9 O. S. 461, and it was held that an answer defective in substance might be cured by averments made in the reply, 1 Colo. 299; but an omission in the petition, of a fact essential to plaintiff's cause of action, is not cured by pleading it in his reply, 15 Minn. 479.

Miscellaneous. Supplementary petition stating antecedent facts a mere amendment, 33 O. S. 336. Amendment setting up insufficient cause of action may be stricken out, 40 O. S. 507. Restriction that amendment must not substantially change claim, etc., refers to the identity and not the form of the remedy, 14 O. S. 213. Not allowed after reservation of case on agreed statement, 14 O. S. 81. No error in refusing leave unless discretion abused, 34 O. S. 46; 44 O. S. 604, 609. Issue is that made by amended pleading unless original made part, 30 O. S. 555. Party falling on account of having mistaken the form of his proceedings in error court will not allow him to amend except in a very strong case, 6 O. S. 61. Rendering judgment for costs against party asking and obtaining leave to amend discretionary, not reviewable, 25 O. S. 115, 122, 123. Misnomer of corporation, amendment allowed, 3 C. C. 23. Suing as executor and amending to charge personally, 45 O. S. 169, 175; 2 C. C. 152; see 14 Bull 214. Trial without objection waives want of such issue in pleadings, 41 O. S. 357. Amendment allowed though inconsistent with original petition, 45 O. S. 222, 232. Of pleadings on trial asking reformation, 46 O. S. 265. Substantially changing claim—amendment changing cause of action from one for money had and received to one for an accounting between partners, 47 O. S. 262. Where in a suit to marshal liens and sell, a defendant sets up a vendor's lien and after judgment against him appeals, he can not in the circuit court amend so as to ask also a personal judgment, 4 C. C. 493. Where after trial plaintiff is allowed to file an amended petition to conform to the proof, but defendant is refused leave to file an amended answer, such refusal can not be reviewed on error unless the proposed answer is incorporated in a bill of exceptions, 3 C. C. 620; 21 Bull 100. Where defendant answers to the merits he enters an appearance and it is not error to permit the petition and summons to be corrected by inserting the true name of the defendant, 3 C. C. 27. Where one in a fiduciary capacity protects the lien of his beneficiary by paying taxes in his own name with the money of the latter and in a suit by the latter to foreclose the mortgage lien sets up the tax claim by cross-petition, a judgment for plaintiff for full amount of taxes and amount due under the mortgage should not be reversed merely on the ground that the petition was not amended to embrace the tax claim, although the relief prayed in the cross-petition was not granted, 42 O. S. 655. New party and answer after judgment perfecting appeal, error to strike from files, 48 O. S. 443, 456. An application to change or renew an undertaking for appeal under § 5223 is a "proceeding" within the meaning of this section, 4 C. C. 35. Inserting material allegation in petition which has been omitted not changing cause of action, 27 Bull 274.

§ 5115. **Immaterial errors and defects.** The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed, or affected, by reason of such error or defect. [51 v. 57, § 138; S. & C. 990.]

Judgment will not be reversed for refusal to sustain a motion to separately state and number causes of action, 36 O. S. 43, because the form of action was misconceived, "in case the facts are substantially alleged, which the party was bound to prove on the trial in order to entitle him to a recovery," 1 O. S. 225; because a bad reason was given for a correct judgment by the court which rendered it, 14 O. S. 28, 37; 4 O. S. 251; 12 O. S. 87, 90; 17 O. S. 374, 384; 13 O. S. 21; for admission of incompetent testimony objected to at the trial, unless it appears that its admission was prejudicial, 11 O. S. 470; 18 O. S. 343; 22 O. S. 62; for error beneficial to the party seeking the reversal, 13 O. S. 131; 2 O. S. 343; where the defect consists in the omission to aver the performance of a condition precedent in the contract sued on, and it appears from the subsequent pleadings and record that the defendant was not prejudiced thereby, 24 O. S. 345; for an erroneous instruction, where it appears from the record that the party objecting was not prejudiced by it, 31 O. S. 219; where summons and an order for the delivery of specific personal property were issued upon a petition and single affidavit containing allegations sufficient to entitle the party to such order, 38 O. S. 657; where the liability sought to be enforced was on a promissory note, while the cause of action proved was for money loaned or the consideration of the note, 41 O. S. 68; where the court allowed defendant to open and close in a civil action for assault and battery, 37 O. S. 415; where parties on appeal from a justice of the peace proceeded to trial before a jury upon a transcript of the justice, and no objection being taken there was a verdict and judgment, 11 O. S. 692; where, in an action to foreclose a mortgage by a building association, the secretary and treasurer prayed judgment for taxes paid in his own name, and it appeared that the taxes were paid by him for the benefit of the association and with its money, 42 O. S. 73; see 1 C. C. R. 62.

In the admission of improper evidence on the part of the defendant which operates only to rebut evidence improperly introduced by the plaintiff, there is no error to the prejudice of the latter, 20 O. S. 516. Where the record shows that the court below misdirected the jury or admitted illegal testimony as to a point material to the issue, it is not necessary in order to reverse the judgment to show that the jury were in fact influenced thereby; such influence will be presumed, 15 O. S. 179. On appeal from a justice of the peace, the court should not allow plaintiff to amend so as to increase the amount of his claim to a sum in excess of the jurisdiction of the justice. Without consent of parties the appellate court is only authorized to allow such an amendment as might have been allowed by the parties, 21 O. S. 659. Where incompetent evidence, which is material to the issue, is allowed to go to the jury in favor of the prevailing party, against the objection of the other party, error to his prejudice will be presumed, 38 O. S. 388. Where the charge of

the court was manifestly erroneous as to a material issue raised by the defense and the record does not disclose all the evidence, the judgment should be reversed, although it does not appear that the defendant was prejudiced thereby, 40 O. S. 139. The error, to be ground of reversal, must be prejudicial to the rights of the party complaining, 42 O. S. 154. Where a demurrer to a petition, omitting a material fact is erroneously overruled, but the defendant by answer supplies the fact omitted, and the cause is disposed of on issues joined upon the answer, the judgment will not be reversed for error in overruling the demurrer, 2 C. C. 351.

§ 5116. Amendment after demurrer sustained. If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by amendment, with or without costs, as the court in its discretion shall direct. [51 v. 57, § 139; S. & C. 990.]

But if no leave to amend be asked for, it is not error to proceed to final judgment against the plaintiff without granting leave to amend, 22 O. S. 159. If a demurrer is sustained to a petition for want of a material averment and the plaintiff failing to amend, judgment is rendered against him, he may begin another action upon the same cause of action, supplying the material averment wanting in the petition in his first action, 41 O. S. 62; generally, 9 C. C. 297.

§ 5117. Continuance after amendment. When either party amends a pleading or proceeding, and the court is satisfied, by affidavit or otherwise, that the adverse party could not be ready for trial in consequence of the amendment, a continuance may be granted to some day in term, or to another term of the court. [51 v. 57, § 140; S. & C. 990.]

1 W. L. M. 351. The application for a continuance is addressed to the sound discretion of the court, 32 O. S. 173, and error can not be predicated on a continuance, unless in case of an abuse of discretion, *Id.* An affidavit that the defendant has been informed that a person absent from the state would swear to certain material facts is insufficient, 6 Neb. 337. Grounds for, see 19 Bull 365.

§ 5118. When party may be sued by fictitious name. When the plaintiff is ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and, when the true name is discovered, the pleading or proceeding may be amended accordingly; and the plaintiff, in such case, must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words "real name unknown," and a copy thereof must be served personally upon the defendant. [51 v. 57, § 141; S. & C. 990.]

§ 5119. **Supplemental pleading.** Either party may be allowed, on such terms as to costs as the court, or a judge thereof, may prescribe, to file a supplemental petition, answer, or reply, alleging facts material to the case which occur subsequent to the filing of the former petition, answer, or reply; but reasonable notice of the application must be given, when the court or judge so requires. [51 v. 57, § 142; S. & C. 990.]

*The office of a supplemental pleading is to bring into the record new facts, so that the court may render its final judgment upon the facts existing at the time of its rendition, 90 Ind. 585. It is the only proper method of presenting facts occurring during the pendency of an action, 37 O. S. 291; 10 O. S. 372. A petition setting up antecedent facts is not a supplemental petition, 33 O. S. 336. A supplemental petition must be consistent with and in aid of the case made by the original petition, 10 O. S. 365, 372. A new cause of action can not be set up by way of supplemental petition, especially a cause of action to which plaintiff was not entitled when he commenced his action, 2 Hun 643. It can not be filed after final judgment for the purpose of vacating, reversing, or modifying such judgment, 39 O. S. 543, 546. It has been allowed by creditors seeking to enforce the contingent liability of stockholders defendants who, before the commencement of the action, had assigned their stock, 8 Bull 23; in foreclosure, where a secured note matures pending the action, to find the amount due, 2 W. L. M. 599; 7 O. (Pt. 2) 231; in actions by or against representatives or successors in interest of a deceased party, 24 O. S. 182; in proceedings in aid to collect a judgment, if set aside, and a new judgment obtained, 10 O. S. 365; 8 O. 203. But in an action to enforce a lien, neither a supplemental pleading nor an amendment is necessary to recover notes falling due after filing the original petition, where the instrument creating the lien and the petition show that it was given to secure those due and to become due before final decree, 16 Ia. 422; and in ejectment plaintiff must still rely upon his title originally set out, and can not, by supplemental petition, rely upon one since acquired, 14 S. C. 434. A supplemental answer takes the place of the former plea *puls darrein* continuance, and any defense which the party may set up in that plea he may set up by supplemental answer, 16 Abb. Pr. 269, as accord and satisfaction, 12 O. S. 98; bankruptcy, 16 O. 12; defense arising after issue joined in ejectment, 5 O. 452; payment, 6 O. 534; though a supplemental answer is not like a plea *puls darrein* continuance, 4 W. L. J. 1 (see 12 O. S. 98), a waiver of defenses before interposed, and is not confined to matters arising since the last continuance, 46 N. Y. 200, 203. The allowance of such an answer is said to be discretionary with the court, 22 Kas. 753; see 72 N. Y. 442; but when the facts sought to be pleaded amount to an entire satisfaction of the cause of action, it is the duty of the court to allow it, 8 How. Pr. 56.*

§ 5120. **When actions may be consolidated.** When two or more actions are pending in the same court, the defendant may, on motion, and notice to the adverse

party, require him to show cause why the same shall not be consolidated; and if it appear that, at the time the motion is made, the actions could have been joined, and if the court, or a judge thereof, find that they ought to be joined, the several actions shall be consolidated. [51 v. 57, §§ 143, 144; S. & C. 990, 991.]

44 O. S. 346; 36 O. S. 261. As where two actions are brought, one upon a note and the other to foreclose a mortgage securing it, 8 W. Law Gaz. 266.

SUBDIVISION VIII. MOTIONS.

§ 5121. **What is a motion.** A motion is an application for an order, addressed to a court or judge, by a party to a suit or proceeding, or one interested therein. [51 v. 57, § 503; S. & C. 1098.]

A motion is the proper remedy for uncertainty, argumentativeness and informality in a pleading, 14 O. S. 200; 6 O. S. 233; to separately state causes of action, 10 O. S. 441; to strike pleadings from the files, 26 O. S. 659, 662; for judgment on pleadings, 31 O. S. 492; to vacate judgment, 11 O. S. 503; for judgment *non obstante veredicto*, 3 Bull. 54; 6 Rec. 564; for new trial, § 5308; to correct mistakes and omissions of clerk or irregularity in obtaining a judgment or order, § 5357. Motion to strike out is not the proper remedy for uncertainty, 1 D. 17, 458; nor is demurrer, 29 O. S. 499. A motion can not supply the place of a demurrer, 10 O. S. 501; 6 O. S. 607. It may be made by one not a party, 11 O. S. 516; 25 O. S. 270. Indefiniteness taken advantage of by, 46 O. S. 44.

§ 5122. **Motion may include several objects.** Several objects may be included in the same motion, if they all grow out of, or are connected with, the action or proceeding in which it is made. [51 v. 57, § 504; S. & C. 1098.]

§ 5123. **Notice of motion.** When notice of a motion is required, it must be in writing, and shall contain the names of the parties to the action or proceeding in which it is made, the name of the court or judge before whom it is to be made, the place where and the day on which it will be heard, the nature and terms of the order or orders to be applied for, and, if affidavits are to be used on the hearing, that fact shall be stated; and the notice shall be served a reasonable time before the hearing. [51 v. 57, § 505; S. & C. 1098.]

20 Kas. 370. Parties are bound to take notice of all motions and orders made in court during the pendency of the action, 2 W. L. M. 829, but not after final judgment, *Id.*

§ 5124. **Who may serve notices.** Notices of motions

may be served by a sheriff, coroner, or constable, or by a disinterested person; and the return of an officer, or affidavit of such person, shall be proof of service. [51 v. 57, § 506; S. & C. 1098.]

§ 5125. **How service to be made.** The service of a notice shall be made as required for the service of a summons, and when served by an officer he shall be entitled to like fees; the service shall be on the party, or his attorney of record, if either is a resident of the county in which the motion is made; and if there is more than one party adverse to such motion, service shall be made upon each party, or his attorney. [51 v. 57, §§ 506, 507; S. & C. 1098.]

§ 5126. **When notice not required.** Motions to strike pleadings and papers from the files may be made with or without notice, as the court or judge shall direct. [51 v. 57, § 508; S. & C. 1099.]

17 Kas. 102; 2 Bates Pl. 966. A motion to strike from the files is waived by pleading over, 37 Ia. 422, or by demurring, 2 C. S. C. R. 80. The practice of making a motion to strike from the files subserve the purposes of a general demurrer is not approved by the courts, 26 O. S. 662. Where objections to the pleading are based not on any irregularity connected with its filing, nor to any matter pertaining to its form merely, but on its alleged insufficiency in matter of substance, the objection should be taken by demurrer and not by motion to strike from the files, 10 O. S. 501.

DIVISION III. TRIAL.

CHAPTER I.

SUBDIVISION I. THE ISSUE—HOW TRIED.

§ 5127. **What is a trial.** A trial is a judicial examination of the issues, whether of law or of fact, in an action or proceeding. [51 v. 57, § 262; S. & C. 1020.]

§ 5128. **What is an issue.** Issues arise on the pleadings where a fact, or conclusion of law, is maintained by one party and controverted by the other. They are of two kinds:

1. Of law.

2. Of fact. [51 v. 57, § 260; S. & C. 1020.]

§ 5207. Parties can not by contract require the court to try their case contrary to established rules of judicial proceedings, 2 O. S. 21; and an agreement of counsel to consider the issues as made up is of no effect, W. 524. "Issues," see 44 O. S. 528.

§ 5129. **An issue of fact.** An issue of fact arises:

1. Upon a material allegation in the petition denied by the answer.

2. Upon a set-off, counter-claim, or new matter, presented in the answer and denied by the reply.

3. Upon material new matter in the reply, which shall be considered as controverted by the opposite party without further pleading. [51 v. 57, § 261; S. & C. 1020.]

§ 5130. **Issues. How tried.** Issues of law must be tried by the court (1), unless referred as hereinafter provided; and issues of fact arising in actions for the recovery of money only (2), or specific real (3) or personal property, shall be tried by a jury, unless a jury trial be waived (4), or a reference be ordered as hereinafter provided. [51 v. 57, § 263; S. & C. 1020.]

1. *Issues of law.* Issues of law should be disposed of before issues of fact, 5 O. S. 87. Where the facts stated in the petition and the nature of the relief primarily demanded are within the sole jurisdiction of a court of equity, a jury trial is not demandable, 27 O. S. 47. An action to compel the return of an insurance policy assigned under duress is not triable by a jury, 1 C. C. R. 28; nor an action for the enforcement of a trust and for an account by a trustee to the *cestui que trust*, 10 O. S. 198, nor an action to foreclose a mortgage, 2 H. 74; but where in an action upon a note and mortgage given to secure its payment, judgment is asked upon the note and for the sale of the mortgaged property, either party may demand a jury trial upon any issue of fact which affects the judgment upon the note, 10 O. S. 437. An action by a husband against his wife for support is not triable by jury, 6 C. C. 490; nor an action against an assignee in insolvency to enforce the allowance of a claim, 3 C. C. 446; 4 Id. 195; 29 Bull 51; nor where new matter set up in the answer constitutes an equitable cause of action which, if established, will extinguish the case made in the petition, and issues are taken on such new matter, 26 O. S. 514, nor where plaintiff brings an action for the reformation of a written contract and at the same time asks for a money judgment to which he would be entitled only in the event of his obtaining the equitable relief sought, and the only issue of fact made by the pleading is on the right to such equitable relief, 28 O. S. 66. A motion for a non-suit involves an admission of all the facts which the evidence tends to prove and presents only a question of law for the court. If there is evidence tending to prove each material fact put in issue and indispensable to a recovery, the case should be submitted to the jury under proper instructions, 38 O. S. 389.

2. *Issues of fact—recovery of money only.* Though numerous items of account and counter-claim are involved in the issue, 22 O. S. 372; and though the action is in the nature of a proceeding in chancery, 4 W. L. M. 153. But an action is not one for the recovery of money only where to administer full relief, it is necessary to invoke the equity powers of the court to adjust the accounts between the parties, and in such case either

party may by virtue of § 5226 appeal to the circuit court from the judgment of the court of common pleas, 29 Bull 119; 50 O. S. 46; 38 O. S. 467; 45 Id. 357; 29 Bull 191. Where non-resident defendants file a motion to dismiss for want of jurisdiction and support it by a verified answer traversing the allegations of the petition by showing that such non-residents are not rightfully joined as defendants, the issue of fact thus presented in an action for the recovery of a money judgment is one in which either party has a right to have trial by jury, 32 O. S. 595. The issue of non-residence is triable by jury, Id. "Issues" here referred to are those arising upon the pleadings, 44 O. S. 528. Where in an action against several defendants the plaintiffs charge a conspiracy to defraud and the appropriation thereby on the part of defendants of money belonging to the plaintiffs for which they seek a joint judgment against the defendants and the answer admits the receipt of a stated sum of money and is otherwise in effect a general denial, either party is entitled to demand a jury notwithstanding the plaintiff prays a discovery and for an account and to have an equitable lien declared and enforced, 45 O. S. 356. If the plaintiff sets out in his petition an equitable cause of action and no issue is taken on the averments thereof, but the defendant sets up new matter in his answer constituting a legal cause of action, which, if established, would extinguish the case made in the petition, such legal cause of action is triable by jury, 2 C. C. 553. In a suit brought by a debtor to have the adverse rights of those who claim the amount he owes determined, and such claimants intervene for that purpose, the issues joined between them are triable by jury, 5 C. C. 16. The right to trial by jury does not depend upon the principles upon which relief is asked, but upon the nature and character of the relief sought. If the relief sought is a judgment for money only the fact that before the adoption of our code the proper remedy would have been by a suit in equity does not affect the right of either party to a trial by jury upon any issue of fact made by the pleadings, 46 O. S. 27; effect of cross-petition, 10 C. C. 502.

3. *Recovery of real property.* In an action by persons claiming to be trustees of an incorporated religious society to recover possession of the real property of the society, an answer denying that the plaintiffs, and alleging that the defendants are such trustees, is properly triable by a jury, 12 O. S. 243; specific performance, 35 Bull 216.

4. *Waiver of jury.* Where both parties appear in the trial of a civil action for the recovery of money only in which issues of fact have been joined, it is error for the court to try the case and render judgment therein, without a jury having been first waived and such waiver entered on the journal, 4 C. C. 307. When by consent of both parties a jury is waived and the cause submitted to the court, neither party can subsequently withdraw his waiver, 1 C. S. C. R. 164. Waiver by acts, 50 O. S. 373.

Reference of issues of fact to jury in chancery cause, see 12 Bull 261. Questions for the court and jury, see 14 Bull 47.

§ 5131. What issues to be tried by court. All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury, or referred. [51 v. 57, § 264; S. & C. 1021.]

SUBDIVISION II. TIME OF TRIAL.

§ 5132. **Trial docket.** The clerk shall make a trial docket at least twelve days before the first day of each term, and the cases shall be set for particular days, in the order in which they stand on the appearance docket; a case in all its stages in the same court, and upon every docket or book, and all papers filed or issued therein, shall bear the appearance docket number; but the clerk shall not place upon the trial docket any case in which nothing remains to be done except to execute an order for the sale of real or personal property, and to distribute the proceeds as directed by the order; and if it becomes necessary, the case may be redocketed, on the application of either party, whereupon it shall stand in all respects as if it had remained on the docket. [55 v. 26, § 306; S. & C. 1034.]

The court does not lose jurisdiction of a case because it was omitted from the docket by the clerk, 35 O. S. 648. The setting of cases for trial in the Hamilton County Common Pleas Court is not governed by this section, but by § 464, 11 Bull 122, 123; see § 5136. Where a decree in foreclosure has been obtained, the leaving of the case off of the trial docket by the clerk as authorized by this section does not alter the effect of the decree, 35 O. S. 432; see generally, 34 Bull 278.

§ 5133. **Judgment on default. When entered.** In an action upon an account, or written instrument for the payment of money only, or in foreclosure, judgment may be entered at any time during the term after the defendant is in default for an answer; but the court may, for good cause shown, give further time for answer. [66 v. 42; § 307.]

See § 5320 as to how damages assessed upon default. In an action for the recovery of money only, it is error to take judgment by default against a defendant, the summons against whom has no indorsement upon it of the amount claimed, and whose appearance to the action is not otherwise affected, 25 O. S. 82. Where judgment is rendered on default in an action on an account without proof of the plaintiff's claim, there is no error for which judgment will be reversed, the requiring of such proof on failure to answer being a matter within the discretion of the court, 25 O. S. 635. See 3 C. C. 144.

§ 5134. **Order in which cases are to be heard.** Cases in which there is an issue of fact, or in which damages are to be assessed, shall be tried in the order in which

they stand on the trial docket, unless, by the consent of the parties, or by the order of the court, they are continued or placed at the heel of the docket, or, for good cause shown, may be especially assigned for trial or hearing out of their regular order, and actions for wages shall be first in order for trial; but the court may assign for trial the cases triable to a jury, in a series in the order in which they stand upon the docket, giving preference always to actions for wages, and cases not triable to a jury, in a series in like manner. All other cases shall be heard in the order in which they stand upon the trial docket, unless the court otherwise direct, and the court may, at any time, hear a motion or demurrer, and may, by rule, prescribe the time of hearing motions and demurrers. Provided, that in any subdivision where there are two or more judges, one of whom, for any cause, shall be disqualified to hear or try any of the causes upon such trial docket, such causes may be assigned for trial or hearing in a series in the order in which they stand upon the docket, by a judge not disqualified to try the same, and may be tried and heard in like order. [86 v. 109; 66 v. 42, § 307.]

The granting or refusal of a continuance is a matter of judicial discretion, and not ground of error unless there is an abuse of discretion, 32 O. S. 173; 11 O. S. 691; 10 O. S. 598; 18 O. S. 438, 446; 26 O. S. 7. Cases on demurrer may, in the discretion of the court, be heard out of the order in which they stand on the trial docket, 26 O. S. 141 (1875); see 34 O. S. 124, 126.

§ 5135. **At what term actions triable.** Actions are triable at the first term of the court after the issues therein, by the times fixed for pleading, are or should have been made up; when the issues are or should have been made up during a term, such action shall be triable at that term; and when the issues are or should have been made up either before or during a term of court, but after the period for the preparation of the trial docket of the term, the clerk, if required by the court, shall place such actions on the trial docket of that term. [51 v. 57, § 308; S. & C. 1035.]

§ 5136. **Clerk to make copy of trial docket for bar.** The clerk shall make a copy of the trial docket for the use of the bar before the first day of the term. [51 v. 57, § 309; S. & C. 1035.]

SUBDIVISION III. TENDER, AND OFFER TO CONFESS JUDGMENT.

§ 5137. **Plea of tender of money before suit.** If, in an action on a contract for the payment of money, the defendant answer and prove that he did tender payment of the money due on the contract, at any time before the commencement of the action thereon, and pay to the clerk, at any time before trial, the money so tendered, the plaintiff shall not have judgment for more than the money so due and tendered, without costs, and shall pay the defendant his costs. [51 v. 397, § 1; S. & C. 1140.]

A bank check is a good tender when the creditor objects only to the amount, 7 O. S. 257; and bank notes, where a party declared he would as soon accept them as specie, 8 O. 169; U. S. treasury notes, 26 O. S. 334. A tender is unnecessary after refusal. W. 741; after repudiation of contract, 44 O. S. 156; 15 Bull 225; when it would be useless, 1 D. 123; 2 Id. 30; 1 Bull, 285; 3 Id. 114; 3 W. L. G. 149, 352; when the contract is denied, 1 C. S. C. R. 170; 11 O. S. 626; 2 W. L. M. 551; 1 H. 357, 532; see generally, condition precedent, tender of performance, 16 O. 294; costs, 13 O. 131; W. 336; insurance, life, 15 Bull 225; lease, 6 O. 294; 8 W. L. J. 471; mortgage, 10 O. S. 339; notes, 34 O. S. 67; 15 O. 200; place, 2 C. S. C. R. 568; 2 W. L. J. 401; pleading, 2 O. S. 10; 1 O. S. 225; 18 O. 532; 13 O. 107; purchase money, 40 O. S. 635; sale, 16 O. S. 472; 5 Id. 51; stock, 2 D. 261; 1 C. S. C. R. 354; time, 18 O. 532; usury, 11 O. 417; 14 O. S. 200; waiver, 6 O. 45; 7 O. S. 257.

§ 5138. **Plea of tender of article or labor before suit.** If, in an action on a contract for the payment of any article or thing other than money, or for the performance of any work or labor, the defendant answer that he did tender payment or performance of such contract, at such time and place, and in such articles, work, or labor, as by such contract he was bound to pay or perform, and the court or jury find that he did tender, as alleged in his pleading, they shall, at the same time, assess the value of the property or labor so tendered, and thereupon judgment shall be rendered in favor of the plaintiff for the sum so found, without interest or costs; but if the defendant forthwith perform his contract, or give to the plaintiff such assurance as the court may approve that he will perform the same within such time as the court may direct, judgment shall be rendered for the defendant; and in case any article so tendered is of a perishable nature, it shall from the time of such

tender, be kept at the risk and expense of the plaintiff, provided the defendant take reasonable care of the same. [51 v. 397, § 1; S. & C. 1140.]

Right to make subsequent tender when first is insufficient, 5 O. S. 51.

§ 5139. Offer to confess judgment before action. Before an action for the recovery of money is brought against any person, he may go into the court of the county of his residence, or of that in which the person having the cause of action resides, which would have jurisdiction of the action, and offer to confess judgment in favor of such person for a specified sum, on such cause of action; whereupon, if such person, having had such notice that the offer would be made, of its amount, and of the time and place of making it, as the court deems reasonable, fail to attend to accept the confession, or if he attend, and refuse to accept it, and afterwards commence an action upon such cause, and fail to recover more than the amount so offered to be confessed, and the interest thereon from the date of the offer, he shall pay all the costs of the action. [51 v. 57, § 499; S. & C. 1095.]

§ 5140. Offer to confess out of court. The defendant in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff, or his attorney, an offer in writing to allow judgment to be taken against him for the sum specified therein; if the plaintiff accept the offer, and give notice thereof to the defendant, or his attorney, within five days after service of it, the offer, and an affidavit that the notice of acceptance was delivered in the time limited, may be filed by the plaintiff, or the defendant may file the acceptance, with a copy of the offer, verified by affidavit; in either case the offer and acceptance shall be noted in the journal, and judgment rendered accordingly; if the notice of acceptance be not given in the period limited, the offer shall be deemed withdrawn; and if the plaintiff fail to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer. [51 v. 57, § 493; S. & C. 1094.]

25 O. S. 301. The "offer to compromise" can not properly be made in an answer, 18 O. S. 373; 49 O. S. 369. Offer to confess

before answer "in full of all claims included in petition," held to apply to amount found due on entire claim and not to amount found due after reduction by set-off, *Id.* And if jury find for plaintiff on cause stated in petition a sum greater than the amount of the offer and interest to time of trial, plaintiff will not be liable for defendant's costs though the sum adjudged due him by the court when reduced by set-off of defendant is less than the amount named in the offer, *Id.* see 35 Bull 259, 311.

§ 5141. **Offer to confess in open court.** The defendant in an action for the recovery of money may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action; whereupon, if the plaintiff, being present, refuse to accept such confession of judgment, in full of his demands against the defendant in the action, or, having had such notice that the offer would be made, of its amount, and of the time of making it, as the court deems reasonable, fail to attend, and, on the trial, do not recover more than was so offered to be confessed, and the interest thereon from the date of the offer, such plaintiff shall pay all the costs of the defendant incurred after the offer was made. [51 v. 57, § 498; S. & C. 1095.]

See § 6581; 18 O. S. 373. It is not sufficient to merely place a written offer on file with the papers in the case, though the plaintiff may have notice that such offer has been so made, 12 O. S. 624. The section is applicable to justices, 15 O. S. 511. An offer to confess judgment before a justice of the peace is available to defendant on appeal, 15 O. S. 511; 46 O. S. 560, and prevents the recovery of future costs, 3 O. S. 384; 11 O. S. 554.

§ 5142. **Such offers not to affect the trial.** An offer made as provided in the three preceding sections shall not be deemed an admission of the cause of action, nor of the amount to which the plaintiff is entitled; nor shall it be a cause of continuance of the action, or a postponement of the trial, or given in evidence, or mentioned on the trial. [51 v. 57, §§ 493, 494, 498, 499; S. & C. 1094, 1095.]

§ 5143. **Provisions made applicable to offer made by plaintiff.** The provisions of this subdivision shall be applied, so far as they may fairly be made applicable, to a tender or offer made by the plaintiff; and to the same extent, the same provisions may, in the discretion of the court, be applied to one or more of several causes of action, counter-claim, or set-off, in which case the court shall make such order as to costs as it deems proper.

SUBDIVISION IV. REVIVOR OF ACTIONS.

§ 5144. What actions abate by death of party. Except as otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except an action for libel, slander, malicious prosecution, for a nuisance, or against a justice of the peace for misconduct in office, which shall abate by the death of either party. [90 v. 140; 75 v. 632, § 18; 51 v. 57, § 399; S. & C. 1058.]

See § 4975. The prosecution of the reputed father of a bastard child does not abate by the death of the child, 19 O. S. 583. An action for malicious prosecution, 1 H. 480, and for slander, 21 O. S. 536, did not, under 51 v. 57, abate by plaintiff's death, nor by defendant's death after verdict and before judgment, 6 O. S. 228, 246; but before the code the death of appellant abated the action, 3 O. 274. "Which," in the last clause of this section, embraces all of the preceding causes of action, and not, as was claimed (21 O. S. 539), simply an action against a justice of the peace, *Id.* 542. A cause of action for wrongfully causing death abated by the death of the wrongdoer, 37 O. S. 372; but death pending the action, did not abate it, 1 Clev. R. 122. Nuisance, 46 O. S. 442. See § 6134, 4 C. C. 521. Action for damages for negligence does not abate by plaintiff's death, 34 Bull 94.

§ 5145. Action for dower does not abate. If the plaintiff in an action for dower die before final judgment therein, the action may be revived in the name of her personal representative, for the purpose mentioned in § 5715. [60 v. 10, § 1; S. & S. 311.]

2 Bull 76.

§ 5146. When action may proceed without revivor. When there are several plaintiffs or defendants, and one of them dies, or his powers as a personal representative cease, if the right of action survive to or against the remaining parties, the action may proceed; but the death of the party, or the cessation of his powers, shall be first stated on the record. [51 v. 57, § 400.]

Suit against executrix, how revived, 8 C. C. 160.

§ 5147. When action abates as to some parties, it may proceed as to others. When one of several plaintiffs or defendants dies, or his powers as a personal representative cease, if the cause of action does not survive, the court, if of opinion that the merits of the controversy can be properly determined, and the principles applicable to the case fully settled, may proceed to try the same as between the remaining parties; but the judgment shall not prejudice any person who was not a

party at the time of the trial. [51 v. 57, § 401; S. & C. 1058.]

§ 5148. Revivor in favor of or against personal representative, etc. When one of the parties to an action dies, or his powers as a personal representative cease before judgment, if the right of action survives in favor of or against his representatives or successor, the action may be revived, and proceed in the name of such representatives or successor. [38 v. 146, §§ 240, 241; 51 v. 57, § 402; S. & C. 611, 612, 1058.]

Revivor in name of successor of assignee, 41 O. S. 591.

Where a decree in foreclosure has been obtained and the plaintiff subsequently dies, the right to enforce the decree abates by his death, but may be revived in the name of his personal representative, 35 O. S. 430; 1 C. C. 33. Petition in error may be filed without revivor, 35 O. S. 244. Judgment of reversal is effective notwithstanding death of plaintiff in error during pendency of proceedings in error. Court to which cause is remanded for new trial may order a revivor of the action, 38 O. S. 97; 2 C. C. 1. If, before the party dies, the case is fully submitted to the court for decision and held under advisement, the court may even at a future term cause its judgment to be entered by a *nunc pro tunc* order as of the day and term that the case was submitted, 1 C. C. 61; suit against executrix, how revived, 8 C. C. 160.

§ 5149. Revivor by motion, or supplemental pleading. A revivor may be effected by the allowance by the court, or a judge thereof in vacation, of a motion of the representative or successor in interest to become a party to the action, or by supplemental pleading alleging the death of the party, and naming his representative or successor in interest upon whom service may be made as in the commencement of an action; but the limitations contained in subsequent sections of this chapter do not apply to this section. [51 v. 57, § 39; S. & C. 958.]

See § 5012; 24 O. S. 182; 29 O. S. 87. The court may allow the representative of a deceased defendant in error to be made party to the proceeding, though more than a year may have intervened from the death of such defendant to the time of making application for such allowance, 30 O. S. 600; see 37 O. S. 143; 38 O. S. 96; 11 C. C. 196; cross-petition in error revived by revivor of case, 40 O. S. 468.

§ 5150. Revivor by conditional order. A revivor may also be effected by a conditional order of the court, if made in term, or by a judge thereof, if in vacation, that the action be revived in the name of the representative or successor of the party who died, or whose powers ceased, and proceed in favor of or against him. [51 v. 57, § 403; S. & C. 1058.]

37 O. S. 143; 29 O. S. 86; 10 Rec. 58.

§ 5151. By whom conditional order made. The order may be made on the motion of the adverse party, or of the representative or successor of the party who died, or whose powers ceased, suggesting his death, or the cessation of his powers, which, with the name and capacities of his representative or successor, shall be stated in the order. [51 v. 57, § 404; S. & C. 1059.]

§ 5152. How conditional order served. If the order is made by consent of the parties, the action shall forthwith stand revived; if not made by consent, the order shall be served upon the party adverse to the party on whose motion it was made, in the same manner, and returned within the same time, as a summons; and if sufficient cause be not shown against the revivor, the action shall stand revived. [51 v. 57, § 405; S. & C. 1059.]

1 W. L. M. 403; 2 Id. 577.

§ 5153. When service may be made by publication. When the plaintiff makes an affidavit that the representatives of the defendant, or any of them in whose name the action is ordered to be revived, are non-residents of the state, or have left the state to avoid the service of the order, or so conceal themselves that the order can not be served upon them, or that the names and residence of the heirs or devisees of the person against whom the action is ordered to be revived, or some of them, are unknown to the affiant, a notice may be published for six consecutive weeks, as provided by § 5048, notifying them to appear on a day therein named, not less than ten days after the publication of the notice is complete, and show cause why the action should not be revived against them; and if sufficient cause be not shown to the contrary, the action shall stand revived. [51 v. 57, § 406; S. & C. 1059.]

No revivor against foreign administrator, 2 C. S. C. R. 55.

§ 5154. When plaintiff dies in whose name action revived. Upon the death of the plaintiff the action may be revived in the names of his representatives to whom his right has passed; if his right has passed to his personal representative, the revivor shall be in his name; and if it has passed to his heirs or devisees who could support the action if brought anew, the revivor may be in their names. [51 v. 57, § 407; S. & C. 1059.]

By analogy this provision is applicable to proceedings in error, 29 O. S. 633, 634.

§ 5155. **When defendant dies, in whose name action revived.** Upon the death of a defendant, in an action wherein the right, or any part thereof, survives against his personal representative, the revivor shall be against him; and it may also be against the heirs or devisees of the defendant, or both, when the right of action, or any part thereof, survives against them. [51 v. 57, § 408; S. & C. 1059.]

Revivor on judgment for alimony against representatives of deceased husband, 4 Bull 833.

§ 5156. **When defendant in real action dies.** Upon the death of a defendant in an action for the recovery of real property only, or which concerns only his rights or claims to such property, the action may be revived against his heirs or devisees, or both, and an order therefor may be forthwith made, in the manner directed in the preceding sections of this subdivision. [51 v. 57, § 409; S. & C. 1059.]

§ 5157. **Limitation when defendant dies.** An order to revive an action against the representative or successor of a defendant shall not be made without the consent of such representative or successor, unless within one year from the time it could have been first made. [51 v. 57, § 410; S. & C. 1059.]

§ 5158. **Limitation when plaintiff dies.** An order to revive an action in the name of the representative or successor of a plaintiff may be made forthwith, but shall not be made, of right, without the consent of the defendant, after the expiration of one year from the time the order might have been first made; but when the defendant is dead, or his powers have ceased, the order of revivor on both sides may be made in the period limited in the last section. [51 v. 57, § 411; S. & C. 1059.]

The mode of revivor provided for by these sections of the code is not exclusive, but the court has discretion to follow the old method, 24 O. S. 182; 29 O. S. 86; see § 5149. Notice required, 1 Clev. R. 12.

§ 5159. **Action to be dismissed when it can not be revived.** When it appears by affidavit that the powers of a party who sues or is sued as a personal representative have ceased, or that either party to an action has been dead, for a period so long that the action can not be revived in the name of his representatives or successor without the consent of both parties, the court shall order the action to be stricken from the docket. [51 v. 57, § 412; S. & C. 1060.]

§ 5160. If plaintiff's representatives fail to revive, case may be stricken from docket. At any term succeeding the death of the plaintiff, while the action remains on the docket, the defendant having given to the plaintiff's representatives, in whose names the action might be revived ten days' notice of the application, may have an order to strike the action from the docket, and for costs against the estate of the plaintiff, unless the action be forthwith revived. [51 v. 57, § 413; S. & C. 1060.]

§ 5161. Trial not to be postponed by reason of revivor. When an action stands revived, the trial thereof shall not be postponed by reason of the revivor. [51 v. 57, § 414; S. & C. 1060.]

CHAPTER II.

CONDUCT OF THE TRIAL.

SUBDIVISION I. SUMMONING AND IMPANELING THE JURY.

§ 5162. Court of common pleas to determine number of jurors to be selected. The common pleas court of each county shall, at the first term thereof in each year, determine the number of persons necessary to be selected in each county, annually, to serve as grand and petit jurors in the several courts of such county, in which juries may be required, and cause a memorandum thereof to be entered on the journal; such order, if not made at that term, may be made at any other time, and amended from time to time at the discretion of the court, and until it is made, the number of persons to be selected for jurors in each county shall be as theretofore determined; but if there has been no such determination, the number shall be one hundred and thirty until otherwise ordered. [82 v. 31; 70 v. 167, § 1.]

See § 5189b. Acts regulating the selection of jurors are not laws of a general nature, within the meaning of the constitution. Art. ii, § 26, and hence may be different in the various counties of the state, 34 O. S. 228. Juries must be selected according to the law in force at the time the selection is made, 31 O. S. 285; but see § 79 R. S.; 42 O. S. 568. Change of law not *ex post facto*, 12 Bull 258.

§ 5163. Apportionment of jurors. *Repealed April 23, 1894.* [91 v. 176.]

§ 5164. *Id.* For each township or ward, etc. *Repealed April 23, 1894.* [91 v. 176.]

§ 5165. *Id.* Clerk to give notice when lists are not returned. *Repealed April 23, 1894.* [91 v. 176.]

§ 5166. Additional apportionment of jurors. *Repealed April 23, 1894.* [91 v. 176.]

§ 5167. Drawing and summoning grand and petit jurors. The clerk of the court shall, within five days from the receipt of the list, write the name of each person so selected upon a separate piece of paper, and after having emptied the box herein provided for, of any names that may then be therein and destroying the same, he shall then put said pieces of paper containing the names of the persons so selected, into a box, to be provided by him at the expense of the county and securely kept for the purpose, and shall, at the clerk's office, between the hours of ten o'clock forenoon and twelve o'clock noon, on the fourth Monday previous to the sitting of the court of common pleas, in the presence of the sheriff, by whom the box shall be shaken before the drawing is made, so as to mix the ballots on which the names are written, and in the presence of any other citizens who may choose to attend, proceed to draw twenty-seven ballots, and such additional number of ballots, if any, not exceeding eight, as the judge of the court of common pleas, in vacation or term time, may direct, but if any ballot so drawn shall bear the name of a person who, at the time of such drawing is known by the clerk to be deceased or to have become a non-resident of the county, every such ballot shall be destroyed, and the same shall not be counted, and the clerk shall continue such drawing until he shall have drawn the required number of ballots, exclusive of those destroyed, as aforesaid, the persons named on the first fifteen of which shall be summoned as grand jurors, and those named on the remainder shall be summoned as petit jurors, and in case of challenge, inability to serve, or other cause, it becomes necessary to fill the panel, the whole of the number of persons so summoned as petit jurors shall be first exhausted before resorting to other means to fill the same (1); and the clerk shall forthwith issue a venire to the sheriff, commanding him to summon the persons whose names are so drawn to attend as jurors at the seat of justice of the county, on the first day of the next term of the court of common pleas holden therein, at ten o'clock A. M., unless the judge of

the court of common pleas, by order made in vacation or term time, direct on what day of the term the petit jurors shall appear, whereupon the clerk shall issue a venire accordingly. [90 v. 133; 86 v. 51; 82 v. 91; 80 v. 219.]

The venire for the grand and for the petit jury must be separate writs, 6 O. 19. 1. Does not relate to grand jury, 46 O. S. 511.

§ 5168. **Juries for circuit court and special terms of common pleas.** The clerk, upon the receipt of an order of the judge of the common pleas court, shall forthwith, between the same hours, at the same place, and in the same presence, draw the names of twelve persons to serve as petit jurors, or twenty-seven persons to serve as grand and petit jurors, for a special term of the common pleas court. Whenever an issue of fact, which the law requires to be tried by a jury, shall be joined in proceedings in the circuit court, the clerk of the circuit court shall, at the instance of either of the parties, forthwith, in like manner, draw the names of twelve persons to serve as jurors in the trial of such cause; and issue his venire for the appearance of the jurors at the proper time and place. [82 v. 31; 70 v. 167, § 6; 50 v. 96.]

48 O. S. 356.

§ 5169. **Service and return of venire.** If the venire be issued in vacation, the sheriff shall summon the persons named therein at least ten days before the sitting of court, and if it be issued in term he shall summon them forthwith; he shall indorse on the venire the names of the jurors, and the time and manner of service, and return the same to the clerk forthwith, if issued in term, or on the first day of the term, if issued in vacation; and service may be made by reading the venire to the persons named therein, or by leaving at their usual place of abode a note or memorandum substantially as follows, to wit: I am commanded to summon you, — — —, to appear before the — — — [insert the name of the court], to be holden in — —, on the — — day of — —, A. D. — —, at ten o'clock A. M., to serve as a grand or petit juror, as the case may be. [70 v. 167, § 7.]

[See § 5189c. Return that juror "can not be found in the county," sufficient, 25 O. S. 369. Hamilton, Cuyahoga, Franklin and Lucas Counties, § 5189c.]

§ 5170. **Names of jurors not serving to be returned to box.** If any person selected as a grand or petit juror, as aforesaid, be not summoned, or if summoned, be excused

from serving at the term to which he is summoned, his name, unless he is exempt from serving as a juror by law, shall be returned to the box, unless otherwise ordered by the court, and shall remain there until drawn out at some subsequent drawing; and when his name is again drawn he shall serve, unless disabled or excused. [78 v. 109; 70 v. 167, § 8.]

See 23 O. S. 349, 355.

§ 5171. When talesmen to be summoned. If, by reason of challenge, or for other cause, there be not present a sufficient number of jurors, summoned as aforesaid, to make up the panel, whether of the grand or petit jury, or if the array be challenged and set aside, the sheriff shall summon a sufficient number of talesmen to make up the deficiency; or, if there be such deficiency in the grand jury, the court may issue a special venire to the sheriff, commanding him to summon the persons therein named to attend forthwith as grand jurors; and at the close of each term of the court, all persons who have served on either jury for such term, together with those who are found permanently disabled, disqualified, or not liable to serve, shall be discharged. [70 v. 167, § 8.]

§§ 5171, 5172, not repealed, 11 C. C. 23.

§ 5172. When special venire may issue. When the court, or a judge thereof, deems it necessary to have two petit juries, or when from any cause, it becomes necessary to have a new petit jury, or a member or members to fill up the regular panel for the term, the court, or a judge thereof, may order the names of the number of jurors required for the new petit jury; or, in case he deems it necessary to fill up the regular panel, he may order not exceeding double the number of names of jurors required therefor to be drawn from the box by the clerk, as in other cases; and a venire issued to summon them to appear as may be directed by the court, or a judge thereof. [82 v. 166; 70 v. 67, § 9; 57 v. 52, § 1.]

§ 5173. When venire for talesmen to issue. When it is necessary to summon talesmen, the court, on motion of either party, shall select them, and cause to be issued immediately a venire for as many persons having the qualifications of a juror as, in the opinion of the court, may be necessary, which jurors shall be required to appear forthwith, or at such time as may be fixed by the court; but no person known to be in or about the courthouse shall be selected, without the consent of both parties. [70 v. 170, § 10.]

See 38 O. S. 153, 155.

§ 5174. **Special venire when sheriff a party.** When the sheriff is interested in a cause in any court of record, the party in interest opposed to that of the sheriff may apply to the court for a special venire, which, upon such application, the court shall direct to be issued to the coroner of the county, commanding him to summon a jury, having the qualifications hereinbefore prescribed, to try such cause; and when both the sheriff and coroner are so interested, or in case of the death, resignation, or absence from the county of both the sheriff and coroner, then, and in either of such cases, the process may be directed to such discreet, disinterested person as the court may name, and the service and return of such person shall be valid to all intents and purposes. [70 v. 171, § 13.]

§ 5175. **When challenge to the array may be made.** A challenge to the array may be made and the whole array set aside by the court, when the jury, grand or petit, was not selected, drawn, or summoned, or when the officer who executed the venire did not proceed as prescribed by law. But no challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror or jurors; but on challenge, a juror or jurors may be set aside by reason of a misnomer in his or their names; but such challenge shall only be made before the jury is impaneled and sworn, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors. [81 v. 43; 70 v. 171, § 12.]

Objection to array not received after challenge for cause, 6 O. 19; non-attendance of jurors not ground for challenge to the array, 24 O. S. 143; misnomer, see 42 O. S. 154, 163; struck jury selected by unauthorized officials, 35 O. S. 423.

§ 5176. **Causes of principal challenge.** The following shall be good cause for challenge to any person called as a juror for the trial of any cause:

1. That he has been convicted of a crime, which, by law, renders him disqualified to serve on a jury.
2. That he has an interest in the cause.
3. That he has an action pending between him and either party.
4. That he has formerly been a juror in the same cause.
5. That he is the employer, employe, counselor, agent, steward, or attorney of either party.

6. That he is subpoenaed in good faith in the cause as a witness.

7. That he is akin by consanguinity or affinity within the fourth degree to either party, or to his attorney.

8. That he is a party to another action then pending in any court, in which any attorney in the cause then on trial is an attorney, either for or against him.

9. That he, not being a regular juror of the term, has served once already as a talesman in the trial of any cause, in any court of record in the county within the preceding twelve months; and in either of said cases the same shall be considered as a principal challenge, and the validity thereof tried by the court. [83 v. 105.]

Race or color not to disqualify, 81 v. 15. No reversal because challenge for cause improperly sustained, 4 C. C. 65.

See § 5189*f*. Waiver by not objecting, 23 O. S. 577; 2 O. S. 164; 12 O. 43, or unless diligence is exercised to ascertain the facts, 4 O. S. 156; 2 D. 147. It is not enough for the party to show that he was ignorant of the fact of the juror's incompetency, or believed him to be competent; he must make inquiry as to the fact at the time the juror is impaneled, 23 O. S. 333. See 30 O. S. 82; 25 O. S. 555; 20 O. S. 228. If the court erroneously overrule a challenge for cause, but the juror is afterward challenged peremptorily, the error is not material if it appear that an acceptable jury was impaneled before the party who challenged for cause exhausted his right to peremptory challenges, 16 O. S. 221; 29 O. S. 186.

2. See 15 Bull 305.

3. Not formerly, T. 80.

4. See 2 O. S. 164; 20 Id. 228; waiver, 1 C. S. C. R. 321.

5. *Empley*, 11 Bull 211; 7. 8 C. C. 345.

9. See 15 O. S. 473; 3 C. C. R. 59. Omitted in 77 v. 90, 36 O. S. 212. Waiver by not objecting, 23 O. S. 577; 25 O. S. 555.

§ 5177. Challenges to the favor and peremptory. Any petit juror may be challenged also on suspicion of prejudice (1) against, or partiality (2) for, either party, or for want of a competent knowledge of the English language (3), or for any other cause that may render him at the time an unsuitable juror, and the validity of such challenge shall be determined by the court; and each party may peremptorily challenge two jurors (4.) [73 v. 20, § 11.]

1. A "prejudice" which disqualifies a juror is usually sought for by the question, "Have you formed or expressed an opinion in this case?" 81 O. S. 139. If a juror has formed or expressed an opinion in relation to a portion of the facts embraced in the issue, but not upon the whole issue, and otherwise stands indifferent between the parties, the allowance or refusal of the challenge is within the discretion of the court, *Id.* This is a cause for challenge under § 7278 (81 v. 53) of the criminal code,

which provides, "but if a juror has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine such juror on oath as to the grounds of such opinion; and if such juror shall say that he believes he can render an impartial verdict notwithstanding such opinion, and if the court is satisfied that such juror will render an impartial verdict on the evidence, may admit him as competent to serve in such case as a juror," *Id.*; see 42 O. S. 154. 2. To authorize the reversal of the judgment where such challenge is sustained, an abuse of discretion must be clearly shown, 30 O. S. 418. 3. Objection to the want of knowledge of the language waived, 9 Bull 76. 4. Peremptory challenges should be made after those for cause, 15 O. S. 221. See 4 O. 348; 20 O. S. 233; 32 O. S. 352; 42 O. S. 568; 18 *Id.* 438; 29 *Id.* 186.

Defendants sued jointly filing separate answers, making same defense, entitled to but two peremptory challenges, 4 C. C. 490. "Party," means "side," 23 Bull 48. Deafness, 9 C. C. 591.

§ 5178. Penalties against jurors refusing to serve. A person summoned as a juror, who, without reasonable and lawful cause, to be judged of by the court, refuses to serve, shall be fined in any sum not exceeding thirty dollars, as for a contempt of court; a juror, after being qualified, who refuses or neglects to obey or observe any order or injunction of the court, may be fined as for contempt, in any sum, in its discretion, not exceeding one thousand dollars; and any fine so assessed may be collected by execution, and shall be paid into the county treasury and disbursed as other fines. [70 v. 173, § 18.]

§ 5179. Jurors not required to serve more than three weeks within the year. A person who serves as a juror, grand or petit, or both, in the courts of this state, for three weeks in any year, shall be exempt from further service as a juror during the balance of the year; but nothing herein contained shall entitle a juror to be discharged from the grand jury during its session, or from a petit jury during the trial of a cause. [70 v. 173, § 20.]

See § 5189k. Hamilton, Cuyahoga, Franklin and Lucas Counties.

§ 5180. Who are exempt from jury service. Public officers, clergymen, and priests, physicians, attorneys at law, members of the police force, or firemen employed by the authority of a municipal corporation, acting volunteer members of companies for the extinguishment of fires organized under and subject to the control of a municipal corporation, and persons who serve as active members of such company for five consecutive years, and all persons over seventy years of age, shall be exempt from service on juries. [89 v. 114; 67 v. 76, § 326; 69 v. 54, § 1; 70 v. 173, § 21; 73 v. 56, § 26.]

See § 5189. Postmaster, 1 O. S. 66, 68. These provisions do not have the effect to disqualify the person so exempted, but merely extend to him a privilege which he may waive, 24 O. S. 206. Hamilton, Franklin, Cuyahoga and Lucas Counties, § 5189.

§ 5181. **Penalties against officers.** No officer shall be allowed compensation for services under this chapter other than that allowed by law; and any officer named in this chapter who refuses or neglects to perform any duty therein required, shall be fined in any sum not exceeding one hundred dollars. [70 v. 173, § 19.]

§ 5182. **Compensation of jurors.** Each grand and petit juror drawn from the jury-box pursuant to law, and each juror selected by the court, pursuant to § 5173 of this chapter, and each talesman shall be allowed two dollars per day, for each day he serves, and if not a talesman, five cents per mile from his place of residence to the county seat, and such compensation shall be certified by the clerk of the court, and paid by the county treasurer on the warrant of the county auditor. [81 v. 128; 73 v. 134, §§ 20, 21; 76 v. 109, § 21.]

See § 5189m. The certificate of the clerk is not conclusive, and if he certifies for days in excess of the number for which the jurors are legally entitled to compensation, the auditor may refuse to issue orders on the county treasury for such excess, 34 O. S. 137 (73 v. 134, § 22). Under this act, jurors are to be allowed compensation for days spent in whole or in part in going to and returning from court, and for days of attendance during the term, whether impaneled or not. But the clerk is not authorized to certify that the jurors are entitled to compensation in addition to such days for days as to which they were discharged and not in attendance, 34 O. S. 137. Hamilton, Cuyahoga, Franklin and Lucas Counties, § 5189m.

§ 5183. **Repealed March 2, 1886, 83 v. 26.** Former statutes, 37 v. 58, §§ 1, 2; 73 v. 136, § 31.

§ 5184. **Repealed March 2, 1886, 83 v. 26.** Former statute, 59 v. 63, § 3.

§ 5185. **Struck jury—How demanded, etc.** *Repealed May 18, 1894.* [91 v. 290.]

§ 5186. **Striking jury.** *Repealed May 18, 1894.* [91 v. 290.]

§ 5187. **How jury made up on the trial.** *Repealed May 18 1894.* [91 v. 290.]

§ 5188. **When court may appoint person to act in place of officer.** *Repealed May 18, 1894.* [91 v. 290.]

§ 5189. **Cost of struck jury, etc.** *Repealed May 18 1894.* [91 v. 290.]

The act repealing the struck jury law did not affect cases pending at the date of its passage. See The Court Index, June 6, 194.

COMMISSIONERS OF AND SELECTION OF JURORS.

AN ACT to provide for the appointment of jury commissioners and the selection of jurors in certain counties, and to repeal certain sections therein named. [Passed April 23, 1894; §1 v. 176.]

§ 1. **Jury-wheel.** *Be it enacted by the General Assembly of the State of Ohio,* That the county commissioners of every county in the state of Ohio, save and except in the counties of Cuyahoga, Franklin, Hamilton, Lucas, Montgomery and Mahoning, each of which has a special act governing the selection of juries in said counties, shall provide and place in the custody of the clerk of each county, save those above named, a wheel so constructed and arranged that by turning the same the pieces of paper hereinafter mentioned may be thoroughly mixed, and that the names upon such pieces of paper can not be read or seen until withdrawn from such wheel.

§ 2. **Commissioners of jurors; appointment, qualifications and term.** In every county save those above mentioned, before the fourth Monday of May of each year, the judge or judges of the court of common pleas, for each subdivision of the judicial district or a majority of such judges, shall, in joint session, appoint four judicious freehold electors in each county in each of the several subdivisions of the judicial districts, save those above excepted, no one of whom shall be an attorney at law, and not more than two of them shall be of the same political party, who shall be commissioners of jurors in each county for one year, and until their successors are appointed and qualified, and a record of such appointments shall be made upon the journal of each of said courts in each separate county.¹

Oath. Such commissioners shall, before entering upon the discharge of their duties, appear before a judge of the county, or in his absence, then before the clerk of courts of said county, [and] take an oath of office as follows: "I do solemnly swear (or affirm) that I will honestly and faithfully discharge the duties of commissioners of jurors without fear or favor, and that I will consent to the selection of no person

¹ 1 N. L. 91.

as juror whom I have been solicited to name as juror, or whom I believe to be unfit for that position, or likely to render a partial verdict in any cause in which he may be called as juror, and that I will report to the court the names of any and all persons who, in any manner, seek by request, hint or suggestion to influence me in the selection of jurors. And this I do as I shall answer unto God" (or, "and this I do under the pains and penalties of perjury").

Duty of court or clerk. And it shall be the duty of said court, or, in his absence, the clerk of said court, before said commissioners shall enter upon the discharge of their duties, to specifically direct their attention to this act, and to instruct and caution them respecting their duties thereunder.

Selection of jurors—Certificates of persons selected. On the fourth Monday of May in each year such commissioners shall meet in the office of the auditor of each county at ten o'clock in the forenoon, and shall there select such number of judicious and discreet persons, having the qualifications of electors of each county, as the court may direct, to be selected as nearly as may be from the several wards and townships in proportion to their respective population; but no person shall be so selected who shall not, in the judgment of all of said commissioners, be competent in every respect to serve as a juror; that after said commissioners shall have first ascertained said wheel to be entirely empty, the names of the persons so selected as aforesaid shall be written by the county clerk on separate pieces of paper, which shall be put into said wheel and securely locked therein in the presence of said commissioners, and said commissioners shall also, at the same time make and sign a certificate containing all of said names, which they shall certify to be the names of the persons selected at the time and place aforesaid, to serve as jurors for the ensuing year, and that they are the same names as those placed in said wheel, which said certificates shall be filed with said clerk.

Wheel to be locked; custodian of wheel and key. Said wheel shall be securely locked at all times, except when by order of court it shall be necessary to put names into it, and to draw them from it in the man-

ner herein provided; and said clerk shall be custodian of said wheel and key.

Penalty for unlawfully unlocking or opening wheel. And if any person shall unlock or open said wheel, except by order of court, he shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not more than one thousand dollars nor less than five hundred dollars, and be imprisoned in the county jail not more than one year nor less than three months.

Appointment when commissioner sick or absent—Meeting and selection of jurors upon order of court—Struck juries and special venires. If either of the commissioners mentioned in this section of this act shall be sick or absent from the county, the presiding judge of the court of common pleas may appoint some judicious and disinterested person to take the place of such commissioner in making selection herein provided for; and the person so appointed shall be of the same political party as the commissioner whose place is to be filled; whenever it shall become necessary, said commissioners shall meet at such time and place as the court of common pleas may appoint, and shall there select such number of persons as the court may, by its order, direct; and the names of such persons shall be selected, written and deposited in said wheel and certified to, as hereinbefore specified; but nothing herein contained shall abridge the right of any party to a struck jury as provided by law, nor affect the issuance, by order of court, of special venires, as now provided by law.

§ 3. Drawing of grand and petit jurors and issuing of venire. Whenever the clerk of any county shall be directed by the order of any court of record therein, or any judge in vacation, to cause any number of persons to be summoned to serve as [a] grand or petit jurors in such court, he shall at once, in the presence of the sheriff, proceed to turn said wheel until said pieces of paper are thoroughly mixed, and shall then draw therefrom the number of names specified in such order, and shall forthwith, unless otherwise directed by said court or judge, issue a venire facias to the sheriff, commanding him to summon the jurors whose names were so drawn, to attend as jurors at the time and place specified in said

order, and all grand and petit juries shall be impaneled from persons so selected and summoned as aforesaid.

§ 4. **Compensation of commissioners.** That said commissioners shall each receive for their services herein named, three dollars for each day employed, to be approved and paid on the order of the county auditor; provided, that they shall not be paid for more than three days' time in any one year.

§ 5. **Penalty for attempting to influence commissioners in selection of jurors; duty of commissioners.** Whoever attempts, by request, hint or suggestion, to influence such commissioners, or any of them, to select or not to select himself or any other person or persons as aforesaid, shall be fined not more than one hundred dollars and be imprisoned in the county jail not more than twenty days. And it shall be the duty of each of said commissioners to report to the said court of common pleas the names of any and all persons who shall attempt as aforesaid to influence said commissioners, or any of them, in their selection of jurors.

§ 6. **Bribery; penalty.** Any commissioner so appointed who accepts any gift, compensation or favor, or the promise thereof, from any person, firm or corporation having any cause pending in any of the courts of such counties, and any person, firm or corporation, or the officer or agent thereof, who shall make or promise any gift, favor or compensation of any kind to any such commissioner, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to the penalties provided by section five (5) of this act.

§ 7. **Repeals; juries already drawn, etc.** That sections 5163, 5164, 5165, and 5166 of the Revised Statutes are hereby repealed. This act shall not be so construed as to affect any jury already drawn for terms of courts about to be in session when the first selection shall be made hereunder.

§ 8. This act shall take effect and be in force from and after its passage.

§ 5189a. Commissioners of Hamilton, Cuyahoga, Franklin, Lucas, and Montgomery counties to provide jury

wheel. The county commissioners of each county having a city of the first class, or the first or second grade of the second class, shall provide and place in the custody of the clerk of such county a wheel so constructed and arranged that by turning the same, the pieces of paper hereinafter mentioned may be thoroughly mixed, and that the names upon such pieces of paper can not be read or seen until withdrawn from such wheel. [89 v. 222; 87 v. 327.]

§ 5189b. Commissioners of jurors in the counties of Hamilton, Franklin, Lucas. Oath. Selection of jurors in Cuyahoga Co. In any county containing a city of the first class, or the first grade of the second class, before the second Monday of May of each year, the judges of the court of common pleas, and of the superior court in any county containing a city of the first grade of the first class, in joint session, and the judges of the court of common pleas in any county containing a city of the third grade of the first class, or of the first grade of the second class, shall appoint three freehold electors of said county, no one of whom shall be an attorney at law in practice in any of the courts, and not more than two of whom shall be of the same political party, who shall be commissioners of jurors for such county for one year and until their successors are appointed and qualified, and a record of such appointments shall be made upon the journal of each of said courts. Such commissioners shall, before entering upon the discharge of their duties, appear in said court of common pleas and take an oath of office, as follows:

"I do solemnly swear (*or affirm*) that I will honestly and faithfully discharge the duties of commissioner of jurors without fear or favor, and that I will consent to the selection of no person as juror whom I have been solicited to name as juror, or whom I believe to be unfit for that position, or likely to render a partial verdict in any cause in which he may be called as juror, and this I do as I shall answer unto God;" [or, "*and this I do under the pains and penalties of perjury*"].

On the second Monday of May in each year, such commissioners, or in any county containing a city of the second grade of the first class, the persons then,

respectively, holding the office of clerk of the court of common pleas, county recorder and county auditor, shall meet in the office of the auditor of such county at ten o'clock in the forenoon, and shall there select such number of judicious and discreet persons, having the qualifications of electors of such county, as the court may direct, to be selected as nearly as may be from the several wards and townships in proportion to their respective population; but no person shall be so selected who shall not be, in the judgment of all said commissioners, or said officers, competent in every respect to serve as a juror; that after said commissioners or said officers shall have first ascertained said wheel to be entirely empty, the names of the persons so selected as aforesaid shall be written by the county clerk on separate pieces of paper, which shall be put into said wheel and securely locked therein in the presence of said commissioners or said officers, and said commissioners or said officers shall, also, at the same time make and sign a certificate containing all of said names, which they shall certify to be the names of the persons selected at the time and place aforesaid, to serve as jurors for the ensuing year, and that they are the same names as those placed in said wheel, which said certificate shall be filed with said clerk. Said wheel shall be securely locked at all times except when, by order of court, it shall be necessary to put names into it, and to draw them from it, in the manner herein provided; and said clerk shall be the custodian of said wheel and key, and if any person shall unlock or open said wheel, except by order of court, he shall be deemed guilty of a misdemeanor and shall, on conviction thereof, be fined not more than one thousand dollars nor less than five hundred dollars, and be imprisoned in the county jail not more than one year nor less than three months. If either of the commissioners or the officers mentioned in this section of this act shall be sick or absent from the county, the presiding judge of the court of common pleas may appoint some judicious and disinterested person to take the place of such commissioner or officer in making the selection herein provided for; and the person so appointed shall be of the same political party as the commissioner or officer whose place is to be filled; whenever

it shall become necessary said commissioners or said officers shall meet at such time and place as the court of common pleas may appoint, and shall there select such number of persons as the said court may, by its order, direct; and the names of such persons shall be selected, written and deposited in said wheel and certified to as hereinbefore specified; but nothing herein contained shall abridge the right of any party to a struck jury as provided by law. [90 v. 254; 89 v. 222.]

This section is numbered § 5189b-3 in 90 v. 254, and repeals § 5189b as amended April 26, 1890, 87 v. 327, which was repealed April 6, 1892, 89 v. 222. §§ 5189a, 5189b, as enacted April 6, 1892, are not repealed so far as they relate to Montgomery Co. by act of April 24, 1893, 52 O. S. 601.

§ 5189b. (2) **Compensation of commissioners.** That said commissioners each shall receive for their services herein named, three dollars for each day employed, to be approved and paid on the order of the county auditor; provided that they shall not be paid for more than ten days' time in any one year. [87 v. 328.]

§ 5189c. **Penalty for influencing commissioners in selection of juries.** Whoever attempts, by request, hint or suggestion, to influence such commissioners, or any of them, to select, or not to select himself, or any other person or persons as aforesaid, shall be fined not more than one hundred dollars, or imprisoned in the county jail not more than twenty days, or both. [87 v. 329.]

§ 5189d. **How grand and petit jurors drawn, and venire issued.** Whenever the clerk of any county shall be directed by the order of any court of record therein, or any judge in vacation, to cause any number of persons to be summoned to serve as grand or petit jurors in such court, he shall at once, in the presence of the sheriff, and the court, or a judge thereof, proceed to turn said wheel until said pieces of paper are thoroughly mixed, and shall then draw therefrom the number of names specified in such order, and shall forthwith, unless otherwise directed by said court or judge, issue a *venire facias* to the sheriff, commanding him to summon the jurors whose names were so drawn, to attend as jurors at the time and place specified in said order, and all grand and petit juries shall be impaneled from persons so selected and summoned as aforesaid. [78 v. 96.]

This section does not repeal the provisions of §§ 7267-7276, or affect them otherwise than in substituting the wheel in place of the box, 38 O. S. 153.

§ 5189d (2). Compensation of commissioners of jurors; repealed April 26, 1890. [87 v. 329.]

§ 5189e. How jurors to be summoned. Sheriff's return. The sheriff receiving such *venire facias* shall forthwith summon such persons by reading the same in their presence, or by leaving at their usual place of abode a note or memorandum substantially as follows, to wit: I am commanded to summon you, ———, to appear before the [insert the name of the court] to be holden in ———, on the ——— day of ———, A. D. ———, at ten o'clock A. M., to serve as a juror; and shall indorse on the *venire facias* the names of the jurors, and the time when summoned, and return the same to the clerk of said court on the first day of its session. [78 v. 96.]

§ 5189f. Challenge for cause. Peremptory challenge. If there shall be impaneled for the trial of any case, any petit juror who has been convicted of any crime, which by law renders him disqualified to serve on a jury, or who has an interest in the cause, or who has an action depending between him and either party, or who has formerly been a juror in the same cause, or who is either party's employer, employe, counselor, agent, steward, or attorney, or who is subpoenaed in good faith in the cause as a witness, or who is akin to either party, or to his attorney, or who is a party to another action then pending in any court in which any attorney in the cause then on trial, is an attorney either for or against him, he may be challenged for cause, and in either of said cases, the same shall be considered as a principal challenge, and the validity thereof tried by the court; and any petit juror who shall be returned for the trial of any cause, and against whom no principal cause of challenge can be alleged, may, nevertheless, be challenged on the ground of prejudice against, or partiality for either party, or for want of a competent knowledge of the English language, or any other cause that may render him, at the time, an unsuitable juror, and the validity of such challenge shall be determined by the court, and each party may peremptorily challenge two jurors. [78 v. 97.]

See §§ 5176, 5177, 7278.

§ 5189g. Repealed March 13, 1884; 81 v. 43.

§ 5189h. When the sheriff and coroner interested. When

the sheriff is interested in any cause in any court of record, the party in interest opposed to that of the sheriff, may apply to the court, which, upon such application, shall direct a special *venire facias* to the coroner of the county, commanding him to summon a jury having the qualifications hereinbefore prescribed, to try such cause, and where both the sheriff and coroner are interested as aforesaid, or in case of death, resignation, or absence from the county of both sheriff and coroner, then, and in either of such cases, the process may be directed to such discreet, disinterested person as the court may name, and the service and return of such person shall be valid to all intents and purposes. [78 v. 97.]

§ 5189i. **Jury may view place or property.** The court, when of opinion it is proper for the jurors to have a view of the property, which is the subject of litigation, or of the place in which any material fact occurred, may order them to be conducted in a body under the charge of an officer to the place, which shall be shown them by a person appointed by the court for that purpose; and while the jurors are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial. [78 v. 97.]

§ 5189j. **Penalty when juror refuses to serve.** If any person summoned as a juror, shall, without reasonable or lawful cause, to be judged of by the court, refuse to serve, he shall be fined in any sum not exceeding thirty dollars, as for a contempt of court. And if any juror, after being qualified, shall willfully refuse or neglect to obey, or observe any order or injunction of the court, he may be fined as for contempt, in any sum in its discretion not exceeding one thousand dollars; and any fines so assessed may be collected by execution, and shall be paid into the county treasury, and disbursed as other fines. [78 v. 98.]

§ 5189k. **No person required to serve as juror more than three weeks in any year.** No person shall be required to serve as a juror more than three weeks in any one year, beginning with the last Monday of April; and after any person shall have served two weeks in any such year, the court shall, on motion, discharge him from further service; provided, however, that nothing herein contained shall entitle or require any juror to be discharged from the grand jury during its session, or from

a petit jury during the trial of a cause; and, provided further, that all courts shall so arrange and conduct the witnesses as to require the attendance of jurors upon its business during as short a time as possible. [78 v. 98.]

§ 5179.

§ 5189l. **Who exempt from jury service.** Active members of fire engine companies, hook and ladder companies, or other companies for the extinguishment of fires, during the time they may continue such active members; active and contributing members of all military companies and batteries, and all clergymen and priests, physicians, attorneys at law, and all public officers, while in office, shall be exempt from serving on juries. [78 v. 98.]

See § 5180.

§ 5189m. **Fees of jurors.** Each grand and petit juror shall be allowed the sum of two dollars per day for each and every day he may serve, and five cents per mile from his place of residence to the county seat, and the compensation of such juror shall be certified by the clerk of the court, and the compensation so certified shall be paid by the county treasurer on the order of the county auditor. [78 v. 98,]

§ 5182.

SUBDIVISION II. TRIAL BY JURY AND VERDICT.

§ 5190. **Mode of conducting trial.** When the jury is sworn, the trial shall proceed, except as provided in the next section, in the following order, unless the court for special reasons otherwise direct:

1. The plaintiff must briefly state his claim, and may briefly state the evidence by which he expects to sustain it.

2. The defendant must then briefly state his defense, and may briefly state the evidence he expects to offer in support of it.

3. The party who would be defeated if no evidence were offered on either side must first produce his evidence, and the adverse party must then produce his evidence.

4. The parties shall then be confined to rebutting evidence, unless the court, for good reasons, in the furtherance of justice, permit them to offer evidence in their original case.

5. When the evidence is concluded, either party may

present written instructions to the court on matters of law, and request the same to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced.

6. The parties may then submit or argue the case to the jury; the party required first to produce his evidence shall have the opening and closing argument, and if several defendants, having separate defenses, appear by different counsel, the court shall arrange their relative order.

7. The court, after the argument is concluded, shall, before proceeding with other business, charge the jury; any charge shall be reduced to writing by the court, if either party, before the argument to the jury is commenced, request it; a charge or instruction, when so written and given, shall not be orally qualified, modified, or in any manner explained to the jury by the court; and all written charges and instructions shall be taken by the jurors in their retirement, and returned with their verdict into court, and shall remain on file with the papers in the case.¹ [89 v. 59.]

See § 7900 criminal code.

3. *Burden of proof.* Upon the trial of issues of fact, the general rule is that the *burden of proof rests upon* the person holding the *affirmative*; and this is especially so where, from the nature of the case, the facts alleged must be peculiarly within his own knowledge, 16 O. S. 88. The discretion ordinarily conceded counsel to pursue their own order in the production of proof so that its relevancy is made manifest during the investigation, must be limited to cases where the fact subsequently to be made relevant is itself established by competent testimony, 11 O. S. 470. Where, in an action to recover damages for an assault and battery, the defendant justifies on the ground of self-defense, it is not error for the court to permit the plaintiff to open and close the case, 31 O. S. 192; but where an issue was joined on an answer justifying the alleged trespass, and the court allowed defendant to begin and close in offering testimony and in the argument, it was held that unless it affirmatively appeared that special reasons did not exist which would authorize the court to change the order of proceeding at the trial, or that the plaintiff was prejudiced thereby, a judgment for the defendant would not be reversed, 37 O. S. 415. In will contests, § 5864.

4. *A party upon whom the affirmative of an issue devolves is bound to give all his evidence* in support of the issue in the first instance, and he can only give such evidence in reply as tends to answer the new matter introduced by his adversary, 4 O. S. 362. But judgment will not be reversed for permitting evidence in the original case to be offered under such circumstances, unless it affirmatively appears that good reasons in furtherance of justice were not shown, 21 O. S. 155. The allowance of evidence to be introduced out of its order rests in the sound discretion of the court, reviewable on error only where an abuse of such discretion is shown, 29 O. S. 851.

¹9 C. C. 691; 10 id. 151.

5. *Instructions.* It is error for the court to omit to charge upon a material point on the request of a party, 83 O. S. 506; to annex to a charge properly asked a material qualification not required or authorized by the evidence, 10 O. S. 14; 14 O. S. 89; to refuse to reduce its charge to writing on points of law, 9 O. S. (act 1845; see subdivision 7; 23 O. S. 146); to refuse to give a true hypothetical proposition, leaving to the jury to say whether the facts existed, 22 O. S. 554; to refuse to charge that contributory negligence defeats plaintiff's case, 24 O. S. 119. To constitute error in the refusal of the court to charge the jury as requested, the proposition requested and refused must be absolutely true under all reasonably conceivable circumstances, 19 O. S. 452; 34 O. S. 127, 133. The court is not bound to give or refuse a charge in the language of counsel, however sound in law or pertinent to the case the proposition may be, but may select its own language, 42 O. S. 154; to be given to jury before argument, 35 Bull. 323.

It is not error to refuse to charge an abstract proposition of law, 17 O. S. 464; or a proposition not appearing to be involved in the case, 17 O. S. 195; 15 O. S. 156; 4 O. S. 389; 80 O. S. 480; 20 O. S. 391; 6 Neb. 418; or to refuse to give an ambiguous and self-contradictory charge, 19 O. S. 356; or to refuse to charge a series of connected propositions, some of which are law and some not, 2 O. S. 598; 19 O. S. 337; or to refuse to give a charge which, if granted, would not aid the party asking it, 1 O. S. 244; nor is it error to refuse to give a charge already substantially given, 23 O. S. 349; 1 Neb. 120; or to refuse a charge which requires the court to assume the existence of material facts in issue, however clearly proven, 24 O. S. 670; or to refuse a charge, though correct law and applicable to the case, if it has the effect of withdrawing material testimony from the jury, 9 Neb. 72; or to refuse to repeat an erroneous special charge, 38 O. S. 97; to refuse a charge where there is a special finding, which shows the party was not injured, 32 O. S. 225; or to refuse to give a written charge which the party is not entitled to have given in the terms in which it is expressed, 43 O. S. 270; or to refuse to charge upon a false hypothetical case, 24 O. S. 631; 16 O. S. 324.

6. *Argument—opening and closing.* While the general rule is that a party holding the affirmative of an issue has the opening and closing of the argument, 16 O. S. 324; 32 O. S. 224; where the trial is to the court and not to the jury, 1 C. C. R. 76; or where there is a complicated state of pleading, 32 O. S. 224; or where special reasons exist, 37 O. S. 415; the court is vested with a liberal discretion in changing the order of proceeding, *Id.* Where plaintiff had opened with the testimony without objection, he will be permitted to open with the argument, though the defendant might have been defeated, if no evidence had been offered on either side, 11 O. S. 339-347; and where opposing counsel decline to reply, the party holding the affirmative is not permitted to address the jury a second time, 1 O. S. 60. In will contests, the party sustaining the will has the opening and closing of the argument, § 5864. In proceedings to appropriate private property by corporations, the land owner has the affirmative, § 6422; in such proceedings by cities and villages the land owner has the opening and closing in the introduction of the evidence and in the argument, § 2245. Formerly, it seems, the city had that right, 32 O. S. 215, and the state, S. & C. 1255, in proceedings to appropriate lands for public works. In libel or assault and battery on a plea of justification or self defense, the plaintiff has the opening and closing, 31 O. S. 192; but where special reasons exist, and in the absence

of anything in the record to the contrary, special reasons are presumed, it is not error for the court to permit the defendant to open and close in such case, 37 O. S. 415, 419. In an action for the recovery of damages, for an alleged wrongful conversion of goods to which the plaintiff claims title, where the defendant answers simply alleging fraud in the assignment under which plaintiff claims, the plaintiff is entitled to open and close, 18 O. S. 115. In an action on a promissory note where the answer pleads payment, and issue is taken on that plea alone, the defendant is entitled to open and close, 25 O. S. 276. In *quo warranto*, for usurping the franchise to be a body corporate, defendants are entitled to open and close, 37 O. S. 631. An averment in answer to a petition upon contract of a material stipulation, in addition to what is set forth in the petition as the contract, amounts, at most, only to a denial of the contract set forth, and does not entitle defendant to open and close, 12 Bull 77. Privilege of counsel in argument in reading extracts from books in evidence, 7 C. C. 327; deposition, see 52 O. S. 519.

7. *Charging jury.* It is error for the court to give oral instructions in addition to a written charge, 40 O. S. 430; to charge a jury as to the costs recoverable in a case, 11 O. S. 457; to re-instruct a jury in the enforced absence of the defendant, 26 O. S. 208; to repeat a charge in the absence of defendant in error, 2 O. S. 54; to give a charge tending to confuse or mislead the jury, 5 O. S. 450; 12 O. S. 312, though not in the abstract erroneous, 19 O. S. 110; to privately explain a charge to the jury, 14 O. S. 511; 8 O. S. 210; to give a charge consisting of extracts from opinions, with no special reference to the facts of the case, 24 O. S. 654; to instruct the jury how to find facts or assume their existence, 43 O. S. 333; to give an erroneous charge, afterwards qualifying it by apt words, if it is uncertain what the rule given or intended to be given really was, 22 O. S. 1; to direct the jury to find for the defendant, when evidence has been offered by both parties, 18 O. S. 323; see 1 C. C. R. 9, 11; but if there is an entire failure of proof on any part of the case essential to the plaintiff's right to recover, it is the duty of the court to arrest the testimony from the jury, and render judgment for the defendant, 21 O. S. 83. Judgment will not be reversed for error in charging an abstract proposition of law unless misleading, 20 O. S. 44; 19 O. S. 157; 20 O. S. 391; 21 O. S. 98; for error in a charge where it is plain no other judgment can be rendered, 37 O. S. 49; for an omission to give an instruction, unless such instruction is requested, 15 O. S. 123; 20 O. S. 34; 22 O. S. 308; 23 O. S. 10; for failure to construe a contract when not requested, 13 O. S. 235; or to explain doubtful words of a statute, 21 O. S. 98.

It is not error to give a true hypothetical proposition, founded upon extraneous facts, 2 O. S. 562; to add a verbal remark after a written charge, and then put the remark in writing, 33 O. S. 429; to give an erroneous special charge, and decline to repeat it, 38 O. S. 97; to direct the jury to find for a party, in case they find certain facts, 33 O. S. 329. Judgment will not be reversed because the court stated general propositions of law not involved in the issues, if it appeared from the whole charge that the jury could not have been misled, 21 O. S. 98; 23 O. S. 144; 31 O. S. 219; for error in a charge as to one of the issues, where the verdict is in favor of the successful party on all the issues, and on either issue he is entitled to judgment, 23 O. S. 626. The court is not bound to reduce its charge to writing unless re-

quested before argument, nor to read it until after the argument, 23 O. S. 146. An objection, that the court delivered the charge in manuscript to the jury without reading it, if available at all, must be taken at the time, 22 O. S. 324. The presumption is that a proper charge was given until the contrary appears, 26 O. S. 371; see 2 C. C. R. 247; 21 Bull 819; 8 C. C. R. 805.

Miscellaneous.—*Judgment reversed for misdirection* as to burden of proof, 26 O. S. 127; 11 Bull 213; 9 C. C. 249. It is error for the court in its charge to assume the existence of a fact about which there is a conflict of testimony, 43 O. S. 332. The record must show that the erroneous instruction was material, 4 O. S. 251. There is no objection if technical phrases are employed, if the jury is not misled, 14 O. 592. If the verdict is in favor of the successful party on all the issues, and on either issue he is entitled to judgment, error in the charge as to one of the issues may afford no ground of reversal, 23 O. S. 626. If the charge is erroneous the judgment will be reversed unless it clearly appears from the record that the party complaining was not prejudiced, 22 O. S. 1; 1 O. S. 141; 15 O. S. 179; 20 O. S. 508; 25 O. S. 50; 30 O. S. 222. If the charge, though not in the abstract erroneous, is calculated to mislead the jury, judgment should be reversed, 5 O. S. 450; 19 O. S. 110, 157; 29 O. S. 412; 2 O. S. 44. So if an erroneous charge be afterward qualified by apt words, yet if it be uncertain what the rule given or intended to be given really was, the judgment will be reversed, 22 O. S. 1. After the jury have retired and come back asking for further instruction, during regular session of court and the parties and their counsel have been loudly called at the door, it is not error for the court to instruct without their presence, 13 O. S. 1. Instructions given immediately after adjournment, but while all are present, and intended as the act of the court, not error, 13 O. 490.

If error could have made no difference in the final result, it is not sufficient ground for new trial, 5 O. S. 88, 375. When the court during the trial, and before the evidence is closed, erroneously strikes from the petition one of the causes of action, the error is not cured by instruction to the jury after the close of the testimony to consider the matter struck out as restored, and to have regard to the testimony applicable thereto, 21 O. S. 191. When the answer set forth a defense, and to a material averment therein there is no reply, the court must charge the jury that the averment must be taken as true, 33 O. S. 304; 26 O. S. 131. If the court charges that certain facts can be presumed, and it is shown that they could be proved on a new trial, the judgment will not be disturbed, 6 O. 409. Where the whole record shows that the proper judgment was rendered, it will not be reversed, although the court mistook the law on some proposition, 14 O. 502. Instructions which are correct under a different state of facts, but which would tend to mislead the jury, properly refused, 21 O. S. 806. Where a party requests the court to charge certain propositions claimed to be law and requests the court to put its charge in writing, it is the duty of the court to strike out and refuse to give any matter that he does not regard as law, and it is error to say to the jury "we give you the following as correct propositions of law, except so far as modified by the general charges of the court," 2 C. C. 246.

Before the last amendment it was discretionary with the court whether charges requested by counsel should be given before or after argument, 3 C. C. 305. Where no exception is taken at

the trial to the charge of the court to the jury, a judgment will not be reversed on error, upon the ground of error in the charge, without reference to the merits of the whole case, 32 O. S. 328. Where the error complained of was that the trial court omitted to give a certain charge, but the error was not included in a motion for a new trial, nor assigned in the circuit court, the Supreme Court will not consider it except for special reasons affirmatively appearing on the record, 46 O. S. 373. Where a single proposition, selected from the charge by bill of exceptions, is claimed to be erroneous, and other propositions to which it refers are not in the record, the reviewing court will presume that the whole charge was a correct statement of the law of the case, 33 O. S. 444. In an action for causing wrongful death, an instruction to the jury calculated to mislead, either as to the real issue in the action, or as to who are the beneficiaries, is error, 28 O. S. 191.

An exception to a charge can not be saved by filing the charge and exceptions with the papers in the case, 31 O. S. 598; nor by setting forth the charge and exception on the journal, 31 O. S. 431; but the objection must be made in a bill of exceptions containing the charge, 11 O. S. 692. Imperative duty of court to give charge requested to jury in writing, 4 C. C. 466. Not essential that judge should himself have written every part of charge, *Id.* Charge made up of different disconnected papers, such as jury could not properly read, insufficient, *Id.* Instructions to jury as to form of verdict after they had retired in absence of counsel, error, 11 Bull 225. Erroneous proposition in final summing up of charge not error where by comparing the whole charge it is apparent the jury were not misled, 4 C. C. 449. The omission to charge on a particular question is not error where no charge was requested upon it, 45 O. S. 445, 452. Where the charge of the court to the jury was manifestly erroneous as to a material issue raised by the defense and the record does not disclose all the evidence, the judgment should be reversed, although it does not appear that the defendant was prejudiced thereby, 40 O. S. 189.

A misleading or erroneous charge of the court will be presumed prejudicial unless the contrary appears for which the evidence itself and not merely what it tends to prove, must be before the reviewing court, 38 O. S. 632, 639. It is not error to refuse to give a series of special charges if the law of the case is correctly and fully given in the general charge, 9 Bull 48. Sending back to jury room a second time special charges, not error, when, 4 C. C. 425. Better practice to give charges asked for in *haec verba*, 8 C. C. 551. Misleading charge on subject of exemplary damages not cured by verdict, 8 Bull 257. Error to charge that railroad company is liable only for gross negligence, 38 O. S. 632. Where a party presents to the court a written request for instructions to the jury, unless he is entitled to have it given in the terms in which it is expressed, there is no error in refusing it, 43 O. S. 270. The court may assume the duty of directing what verdict shall be given when there is no controversy on the facts as to the evidence, 45 O. S. 333, 335. Failure to define clearly the kinds of damage for which defendants were jointly liable, not error, no request to charge therefor having been made and the verdict being clearly supported by evidence of joint liability, 40 O. S. 496. Special verdict rendering charge on other points immaterial unless finding prejudicial, etc., 45 O. S. 470. Error for court to assume existence of material facts

in dispute, 40 O. S. 52; 43 O. S. 332. Omission to give, when error not assigned in court below, 46 O. S. 373. Instructions given to jury by justice of peace in the course of a trial before him are reviewable on error, 29 Bull 102. A charge which contains substantially incorrect statements of evidence offered upon the trial is erroneous, 7 C. C. 327. A charge that "a contract for purchase of goods on credit, made with intent on part of purchaser not to pay for them is fraudulent, and if the purchaser has no reasonable expectation to pay, it is equivalent to an intention not to pay," a correct statement of the law, 31 O. S. 162; 27 Bull 216. Courts have power in the interest of justice to admit further evidence after a cause has been finally submitted and the jury are deliberating on their verdict, 26 Bull 65. Exception to charge as being too general is not to be sustained unless there are requests which would make it more specific which are refused, 9 C. C. 46.

§ 5191. When jury may view place or property. The court, when of opinion it is proper for the jurors to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by a person appointed by the court for that purpose; and while the jurors are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial. [51 v. 57, § 267; S. & C. 1023.]

A view under § 5189 and 5191 is solely to enable the jury to apply the testimony adduced upon the trial and an instruction that the jury must consider such view is error, 7 C. C. 136; 9 Id. 33; 35 Bull 182. See 19 Bull 258.

§ 5192. Jury may decide in court, or retire for deliberation in custody of officer. When the case is submitted, the jury may decide in court, or retire for deliberation; if the jurors retire, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict, or are discharged by the court, subject to the discretion of the court, to permit them to separate temporarily at night, and at their meals; the officer having them under his charge shall not suffer any communication to be made to them, nor make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court; and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon. [51 v. 57, § 268; S. & C. 1023.]

See § 5305, notes.

§ 5193. Admonition, if jurors permitted to separate. If the jurors be permitted to separate, either during the trial, or after the case is submitted to them, they shall be

admonished by the court that it is their duty not to converse with, nor suffer themselves to be addressed by, any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon, until the cause is finally submitted to them. [51 v. 57, § 269; S. & C. 1023.]

The court is not required to repeat an admonition, 2 C. S. C. R. 132. Waiver by failure to except, 12 Bull 197; see 33 Bull 90.

§ 5194. Further instructions when jurors disagree. After the jurors have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court, where the information upon the matter of law shall be given; and the court may give its recollection as to the testimony on the point in dispute, in the presence of, or after notice to, the parties or their counsel. [51 v. 57, § 270.]

Cases discussed as to notice in, 10 C. C. 395.

The section is applicable to criminal as well as to civil cases, 35 O. S. 421. It is error for a judge, during a recess of his court, and in the absence of the party and his counsel, and without notice to them, to give instructions to the jury, to whom the case has been submitted, 8 O. S. 211; but where the parties and their counsel, being called or sent for, fail to attend, it is not error for the court further to instruct the jury in their absence, 13 O. S. 1; see 1 D. 327; *Id.* 512; 2 C. S. C. R. 36; 11 Bull 225. 5 C. C. 375.

§ 5195. Discharge of jury before verdict. The jury may be discharged by the court on account of the sickness of a juror, or any accident or calamity requiring its discharge, or by consent of both parties, or after the jurors have been kept together until it satisfactorily appears that there is no probability of their agreeing. [51 v. 57, § 271; S. & C. 1024.]

Errors waived when jury discharged by consent, 1 O. S. 386.

§ 5196. When cause to be retried. When the jury is discharged after the cause is submitted, or during the trial, the cause may be tried again immediately, or at a future time, as the court may direct. [51 v. 57, § 272; S. & C. 1024.]

§ 5197. Return of verdict. When the jurors agree upon their verdict, it must be reduced to writing, and signed by the foreman; they must then be conducted

into court, their names called by the clerk, and the verdict rendered by the foreman; and the clerk must read the verdict to the jury, and make inquiry whether it is their verdict. [51 v. 57, §§ 273, 274; S. & C. 1024.]

That a verdict was not in writing was held not ground for a new trial under the criminal code, 19 O. S. 579.

§ 5198. When jury must be sent out again for further deliberation. If a juror disagree, or if, when the jury is polled, a juror answer in the negative, or if the verdict is defective in matter of substance, the jury must be sent out again, for further deliberation; and either party may require the jury to be polled, which shall be done by the clerk or court asking each juror if it is his verdict. [51 v. 57, §§ 273, 274; S. & C. 1024.]

See 8 O. 405.

§ 5199. Discharge. When verdict corrected. If no disagreement be expressed, and neither party require the jury to be polled, or, on the polling, each juror answer in the affirmative, the verdict is complete, and the jury shall be discharged from the case; and if the verdict be defective in form only, it may, with the assent of the jurors, before they are discharged, be corrected by the court. [51 v. 57, §§ 273, 274; S. & C. 1024.]

And under the former practice, 2 O. 31; 3 O. 384; W. 645; see 2 C. S. C. R. 132; but not by a court of error, 5 O. 228; 9 O. 181; nor after the verdict is received and the jury discharged, 11 O. 472.

§ 5200. Special and general verdict. The verdict of a jury must be either general or special; a general verdict is that by which the jury finds, generally, upon all or any of the issues, in favor of either the plaintiff or defendant; a special verdict is that by which the jury finds the facts only, and it must present the facts as established by the evidence, and not the evidence to prove the facts; and the facts must be so presented that nothing shall remain to the court but to draw from them conclusions of law. [51 v. 57, § 275; S. & C. 1024.]

Upon the trial of an issue of fact, a special verdict should find facts to which the law gives a determinate effect, conclusive of the issue; and no judgment can be rendered on findings of facts which are in the nature of evidence only, and are not in law conclusive upon the questions at issue, 10 O. S. 148; see 20 O. 168, 231; 12 O. S. 175; see 45 O. S. 470; 12 O. S. 175.

§ 5201. When jury may render general or special verdict. In all actions the jury, unless otherwise directed by the court, may, in its discretion, render either a general or a special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues, and in all cases, when requested by either party, the court shall instruct the jurors, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon, and the verdict and finding must be filed with the clerk and entered on the journal. [91 v. 298; 51 v. 57, § 276.]

The right of the court to direct, 8 O. S. 570, and of the jury to render a special verdict, discretionary, 12 O. S. 618.

§ 5202. Special findings control general verdict. When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly. [51 v. 57, § 277; S. & C. 1026.]

28 O. S. 200; 33 O. S. 246; 2 C. C. R. 56; Id. 366; 8 Kas. 668; 6 Abb. n. s. 251; 13 Barb. 153; 19 Bull. 204, 214; 45 O. S. 471.

§ 5203. When jury must assess amount of recovery. When, by the verdict, either party is entitled to recover money of the adverse party, the jury, in its verdict, must assess the amount of recovery. [51 v. 57, § 278; S. & C. 1026.]

But if the language of the verdict is such that, when read in connection with the record, the amount assessed for the plaintiff can not be ascertained without reference to the evidence offered on the trial, no judgment can properly be entered on the verdict, 33 O. S. 52.

SUBDIVISION III. TRIAL BY THE COURT.

§ 5204. Waiver of trial by jury. In actions arising on contract, the trial by jury may be waived by the parties, and in other actions with the assent of the court, in the following manner:

1. By the consent of the party appearing, when the other party fails to appear at the trial, by himself or attorney.

2. By written consent, in person or by attorney, filed with the clerk.

3. By oral consent in open court, entered on the journal. [51 v. 57, § 279; S. & C. 1026.]

A party waives his right to a jury where he suffers his case to be tried without objection until after the issues are found against him, 17 O. S. 72; and where a case is regularly set down

for trial on submission for several terms, and both parties prepare to try it, this is a waiver of a jury trial, 1 C. S. C. R. 164; but up to the time of trial either party may appear and demand a jury, 1 Bull 110. Where a case triable by jury has been set in a submitted room, and no notice of its setting is given to the opposite counsel, it is error in the court to render judgment by submission, 9 Bull 308. Where judgment is rendered on default in an action on an account, there is no error for which the judgment will be reversed, 25 O. S. 635. In replevin the plaintiff failing to appear, the defendant, with the assent of the court, may waive a jury, and the court finding for him may assess his damages without a jury, 2 Clev. Rep. 114. A party may waive his right to a jury trial by acts as well as by words. And where in a case of which the court of common pleas having jurisdiction, the parties may also by consent waive jurisdiction to try the case without a jury, the record shows that the parties appeared and neither demanded nor waived a jury, but without objection submitted the case to the court upon the pleadings, evidence, and argument of counsel, it is not error for the court to proceed to final judgment in the case. An objection by the defeated party first made after such submission and judgment comes too late, 50 O. S. 373. The section does not impair the right of trial by jury. The inconvenience of being compelled to take an appeal has not been regarded as impairing the right, 49 O. S. 681. Generally, 4 C. C. 310.

§ 5205. What the court must state in its findings. Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall state in writing the conclusions of fact found, separately from the conclusions of law. [51 v. 57, § 280; S. & C. 1026.]

If the court refuse the request of a party to make such special finding, the judgment against him will be reversed, unless it clearly appears that he was not prejudiced thereby, 38 O. S. 37; 3 N. P. 13; but if the party makes no request for a finding under this section, and an issue is found against him, he can not stand by when the journal entry is made, make no objection to its form or entry, and afterwards avail himself of inconsistencies in the statement of the steps by which the court reached its conclusions, 12 O. S. 1; and if a party, at the time, makes no objection to the sufficiency of the facts found, he must submit to such judgment as the facts found require, 38 O. S. 416. When the court, being requested to state separately its conclusions of law and fact, makes a sufficient finding of the facts and renders a final judgment thereon, the judgment itself is to be regarded as a statement of the court's conclusions of law, within the meaning of this section, 22 O. S. 38. When such finding of facts is imperfect, in that it is too general in its terms and does not specifically find the facts in issue, but is not excepted to on that ground, and the record shows that it is sustained by the evidence, judgment will not be reversed for the defect, *Id.*; nor be-

cause the court erred in its statement of the law applicable to a state of facts not found by the court or shown by the evidence, if it sufficiently appears from the record that the judgment was warranted, *Id.* Requests for findings, when to be made, 1 N. P. 188.

The facts found must be sufficient in themselves to authorize the judgment rendered, 35 O. S. 623; and if the finding of facts admits of a construction which will support the judgment, that construction will be adopted, 25 O. S. 255; but such finding must contain the facts to which the law gives a determinate effect, conclusive upon the issue, 10 O. S. 148; 52 O. S. 362. When a fact is admitted by the pleadings, and no evidence offered to disprove it, it is error for the court, when special findings are requested under this section, to state the facts contrary to such admission, 23 O. S. 473.

If the court make a special finding of facts and render judgment thereon, the same may be reviewed on error, though not made at the request of either party, 35 O. S. 113. Where a motion for a new trial, on the ground that such special findings are contrary to the evidence, has been overruled and exceptions taken, and the whole testimony embodied in a bill of exceptions, the reviewing court, having found the error complained of to exist, will look into the whole record to ascertain whether the error was prejudicial to the party, 23 O. S. 473. While the opinion of the court in deciding a case may be in such terms as to constitute a finding of facts under this section, yet the practice of making an opinion a substitute for such finding is irregular; and where the law and facts are blended, the opinion will not be regarded as a substantial compliance with this section, 31 O. S. 650; 34 O. S. 442.

Where the conclusions of fact are found separately from the conclusions of law, a question as to the sufficiency of the evidence upon which findings of fact were made by the court, can only be raised by a bill of exceptions, 30 O. S. 92. In an action on a promissory note, a special finding of fact that the maker can not read or write is not equivalent to a finding that he was free from fault or negligence, 36 O. S. 530. The opinion of the court in deciding a case, in which the facts and law are stated generally, can not by bill of exceptions be made a substitute for the statement of "the conclusions of fact found separately from the conclusions of law," 31 O. S. 650. In the absence of all showing to the contrary, the general finding and judgment will be presumed to include all issues made in the case not specially passed on, 33 O. S. 410. In order to have the decision reviewed on questions of law, where there is a separate finding of facts, a motion for a new trial is not necessary, 34 O. S. 1. The findings of a court upon an issue of fact, like a special verdict found by a jury upon an issue of fact, if incomplete, can not be helped out by an intendment or presumption to insert findings which are omitted, 16 Bull 354. Written opinion of the court which does not state the conclusions of all the vital facts separately from the conclusions of law, is not a compliance with this section, 19 Bull 121. The refusal of a court in a special finding of facts to find certain facts, arising on the evidence which, if found, would not have necessitated the rendition of a different judgment is not ground for reversal, 8 Bull 259, 260. Must be manifestly against weight of evidence, 1 N. P. 355.

2 5206. Provisions applicable to trial by court. The

provisions of this chapter respecting trials by jury shall apply, so far as they are in their nature applicable, to trials by the court. [51 v. 57, § 303; S. & C. 1034.]

§ 5207. **Trial of agreed cases by the court.** Parties to a question which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action were brought; but it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties; and the court shall, thereupon, hear and determine the case, and render judgment, as if an action were pending. [51 v. 57, § 495; S. & C. 1094.]

The case submitted must be an agreed statement of facts which might be the subject of a civil action, and upon which a judgment may be rendered as if an action were pending thereon, 30 O. S. 120; see 2 Bull 81; 6 Rec. 73; and where a case submitted under this section merely propounds questions of law, without an agreed statement of facts on which a judgment can be rendered, the court should dismiss the cause without judgment and without costs, *Id.* A motion for a new trial, or a bill of exceptions, is not required in proceedings in error under this section, 22 O. S. 149. No pleadings necessary, 35 O. S. 586. Agreed statement can not be withdrawn except by leave, 13 O. S. 574. Parties having submitted the case in the lower court, can not complain, in a proceeding in error, that the necessary parties were not before the court, 3 C. C. 1.

§ 5208. **Record in agreed case.** The case, the submission, and the judgment, shall constitute the record. [51 v. 57, § 496; S. & C. 1095.]

§ 5209. **Judgment. Reversal.** The judgment shall be with costs, may be enforced, and shall be subject to reversal, in the same manner as if it had been rendered in an action, unless otherwise provided in the submission. [51 v. 57, § 497; S. & C. 1095.]

SUBDIVISION IV. TRIAL BY REFEREES.

§ 5210. **All issues may be referred by consent.** All or any of the issues in the action or proceeding, whether of fact or of law, or both, may be referred by the court, or a judge thereof in vacation, upon the written consent of the parties, or upon their oral consent in court, entered upon the journal. [51 v. 57, § 281; 69 v. 109, § 287; S. & C. 1027.]

See 7 O. (Pt. 2) 62; 22 O. S. 372; 1 Kas. 324; 3 Id. 18; 4 Id. 319; 3 Neb. 94; 5 Id. 154. Consent will be presumed when the record fails to show that objections were made to the reference, 6 Neb. 382. Where the reference was made on motion of the defendant,

he can not object that there was no agreement to refer, 25 O. S. 567. An appeal vacated the report under former statutes, 7 O. S. 129; 25 O. S. 402.

§ 5211. When the court may order a reference without consent. When the parties do not consent, the court, or a judge thereof in vacation, may, upon the application of a party, or of its or his motion, direct a reference in any case in which the parties are not entitled by the constitution to a trial by jury. [51 v. 57, § 282; 69 v. 109, § 287; S. & C. 1027.]

§ 5212. Reference in vacation. If a referee die, or be disabled, or refuse to serve, a judge of the court in which the action is pending may, in vacation, appoint another person to take his place, or again direct a reference as provided in the two preceding sections. [69 v. 109, § 287.]

§ 5213. Trial before referee. Report, exceptions, and judgment. The trial by referees shall be conducted in the same manner as a trial by the court (1); referees may summon and enforce the attendance of witnesses, administer all necessary oaths in the trial of the case, and grant adjournments, the same as the court; they must state the facts found, and the conclusions of law, separately (2), and their decision must be given, and may be excepted to and reviewed, in like manner (3); their report upon the whole issue shall stand as the decision of the court, and judgment (4) may be entered thereon in the same manner as if the action had been tried by the court; when the reference is to report the facts, the report shall have the effect of a special verdict (5); and, when the court directs it to be done, the referee shall reduce the testimony of the witnesses to writing, and require them severally to subscribe the same. [51 v. 57, § 283; 64 v. 144, § 1; S. & C. 1027; S. & S. 579.]

1. 7 O. S. 129; 1 Clev. R. 226; 2 Id. 9. Submission to the report is a waiver of a jury, 22 O. S. 372. The evidence need not be reduced to writing, 7 O. S. 129. Amended or supplemental pleadings may be filed during the progress of the cause before the referee, 33 O. S. 336-356. 2. 1 C. S. C. R. 241. 3. 33 O. S. 336; 7 O. S. 129, 132; 2 Clev. R. 9. Motion for new trial must be made before referee, 1 C. S. C. R. 341. Motion to confirm report waives exceptions, 9 Rec. 550. Order refusing to set aside not appealable, 26 O. S. 439; 33 Id. 336. 4. Without motion or notice, 1 C. S. C. R. 241, or contrary to the report, 41 O. S. 81. The court may, in its discretion, order a recommitment of the report, 22 O. S. 372; 33 O. S. 336; may order referee to file a supplemental report, 33 O. S. 336; may examine the testimony, 2 Bull 33; but if no exception

is taken to the competency and relevancy of testimony at the time it was offered, and properly noted, and if the referee was not required to state the facts found and conclusions of law separately, the report can not be re-examined, 3 W. L. G. 251; 2 D. 216. A majority of the referees may report, *Id.*; but the report of a majority has effect only as a report, 16 O. S. 573. Judgment not including costs irregular, 1 C. S. C. R. 166. See 7 O. S. 129; 25 O. S. 402. Distinction between referee and master commissioner, 2 C. C. R. 103, 106. See as to notice, 30 Bull 309.

§ 5214. **How referees chosen.** In all cases of reference, except when an infant is a party, the parties may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint referees, not exceeding three, who shall be free from exception. [51 v. 57, § 284; S. & C. 1027.]

§ 5215. **When reference may be made by probate court.** A reference as provided in this chapter can not be ordered by a probate court, unless by consent of the parties to the reference, and the referees. [51 v. 57, § 285; S. & C. 1027.]

§ 5216. **Referees must sign bill of exceptions.** The referees shall sign any true exceptions taken to an order or decision by them made in the case, and return the same with their report to the court which made the reference. [51 v. 57, § 286; S. & C. 1028.]

When no exceptions are taken, the referees' finding of facts will be conclusive. 6 Neb. 378. Motion for new trial necessary to obtain review of decision, 11 Neb. 129. Action of court on motion to recommit report not subject to review, 22 O. S. 372; 33 O. S. 336.

§ 5217. **Oath of referees.** The referees must be sworn well and faithfully to hear and examine the cause, and to make a just and true report therein, according to the best of their understanding; and the oath may be administered by any person authorized to take depositions. [51 v. 57, § 288; S. & C. 1028.]

Waiver of omission to take oath by proceeding to trial without objection, 5 Neb. 126, 156.

§ 5218. **Compensation of referees.** The referees shall be allowed such compensation for their services as the court deems just and proper, which shall be taxed as a part of the costs in the case. [51 v. 57, § 289; S. & C. 1028.]

SUBDIVISION V. TRIAL BY MASTER COMMISSIONERS.

§ 5219. **Master commissioners, appointment of.** The court of common pleas may appoint, in each county, such number of persons as may be necessary, to be mas-

ter commissioners, who shall hold their office for the term of three years, unless removed by the court for good cause; and the master commissioners so appointed shall have power to administer all oaths required in the discharge of their official duties, or authorized to be administered by the laws of this state. [65 v. 40, § 611; S. & S. 573.]

§ 5220. **Oath and bond of master commissioner.** Before a master commissioner enters upon the duties of his office he must be sworn to perform them faithfully, and shall also, with surety, to be approved by the court, execute an undertaking to the state of Ohio, in such sum as the court shall direct, to the effect that he will pay over all money, and faithfully discharge the duties of his office; the court may, at any time, require a master commissioner to give other or further security, and in default thereof, by a day fixed by the court, his office shall thereby be vacated; and the undertaking shall be filed in the office of the county auditor, and may be sued upon as provided in § 4994. [51 v. 57, § 612; S. & C. 1136.]

§ 5221. **Special master commissioner.** The court may appoint a special master commissioner, who shall be sworn faithfully to discharge his duties, and who may administer all necessary oaths on any hearing before him. [65 v. 40, § 611; S. & S. 573.]

Not required to give bond, 15 O. S. 548. Judicial sale may be made by special master, Id.

§ 5222. **What actions may be referred to master commissioner, and how.** The court, or a judge thereof in vacation, may, upon motion of a party, refer an action in which the parties are not entitled to a trial by jury (1), to a regular or special master commissioner, to take the testimony (2) in writing, and report the same to the court, and therewith his conclusions on the law and facts involved in the issues, which report may be accepted to by the parties, and confirmed, modified, or set aside by the court (3). [65 v. 40, § 611; S. & S. 573.]

1. To marshal assets, W. 261; to ascertain chattel mortgagor's interest on execution, 1 H. 509; in specific performance for an account, W. 706; valuation of leasehold, 22 O. S. 467. It has been held that the consent of plaintiff to a reference is not necessary in an action on a complicated account, 1 C. S. C. R. 69; contra, that the consent of both parties must be obtained, 7 O. (Pt. 2) 62. When the parties have consented to a reference, and

the master has filed his report, neither party is entitled to have the same issues sent to a jury, 2 C. S. C. R. 5. A reference is discretionary with the court, W. 532, 536. 2. Admissible after witness' death, 14 O. S. 434. 3. The report may be confirmed on motion without setting the case, 2 C. S. C. R. 10. It is subject to review, 1 C. S. C. R. 176. An appeal does not vacate it, 2 C. C. R. 103; 1 Id. 348; 7 O. S. 129. Questions open on appeal, 13 O. 505; 2 W. L. M. 581. Re-reference by appellate court to same master, 1 O. 270. Acquiescence in submission binds party, Id. Parties can not object to supplemental report of master correcting a mistake, W. 526, 529. An order confirming a master's report, a final order, 1 O. S. 511, but not one referring a case to a master to report, 11 Bull 105; 13 O. 408, 421. Bill of exceptions not embodying report, 15 O. S. 399.

§ 5223. Powers and duties of master commissioners. A master commissioner, or special master commissioner, may summon and enforce the attendance of witnesses, and grant adjournments, the same as the court; and when the court directs it to be done, shall require the witnesses severally to subscribe their testimony. [65 v. 40, § 611; 64 v. 144, § 1; S. & S. 573, 579.]

§ 5224. Compensation of master commissioners. A master commissioner or special master commissioner shall be allowed such fees as are allowed for similar services to other officers. [51 v. 57, § 613; S. & C. 1136.]

Master commissioner can not, in his own name, prosecute error for refusal to allow his fees, 26 O. S. 312. In an action for a partnership account, the court may order plaintiff to pay fees, if defendant is insolvent, 1 C. S. C. R. 166. Order fixing compensation not reviewable until final judgment, 4 Bull 294; 8 Rec. 22. In a proceeding to enforce the individual liability of stockholders, plaintiff's attorney's fees and costs of reference are chargeable to the fund, 1 C. S. C. R. 230, 240.

SUBDIVISION VI. TRIAL ON APPEAL.

§ 5225. Trial on appeal. The circuit court shall have jurisdiction of certain cases, as hereinafter provided, by appeal; and the trial therein shall be conducted in the same manner as in the common pleas court, and upon the same pleadings (1), unless amendments (2) are permitted or ordered by the circuit court. [83 v. 61; 82 v. 31; 65 v. 211, § 5; 50 v. 93, § 11; S. & C. 1169; S. & S. 589.]

1. 14 O. 437. 2. 8 O. S. 1, 29, 32; 25 O. S. 609; 33 O. S. 410; and the court may permit new parties to be made, 12 O. S. 11, 33; 20 O. S. 38. 48 O. S. 457; 5 C. C. 73. Same pleadings, 7 C. C. 540.

§ 5226. When an appeal may be taken. In addition to the cases and matters specially provided for, an appeal may be taken to the circuit court, by a party or other

person directly affected, from a judgment or final order in a civil action rendered by the common pleas court, and of which it had original jurisdiction, if the right to demand a jury therein did not exist, and from an interlocutory order made by the common pleas court, or a judge thereof, dissolving an injunction, in a case of which it had original jurisdiction; but such interlocutory order dissolving such injunction shall not be suspended by the appeal, except by the order of the circuit court, or two judges thereof in vacation, on reasonable notice to the adverse party; provided, that the court or judge may, at the time of making such interlocutory order, upon good cause shown, suspend the operation thereof for any period not exceeding ten days, within which period the party appealing may perfect the appeal. [82 v. 32; 80 v. 117; 69 v. 71, § 1; 65 v. 211, § 5.]

See Executors and Administrators, § 6203 and 6407.

Appeal from interlocutory order, etc., does not transfer case to appellate court for trial on issues. Dismissal of plaintiff's action in common pleas leaves nothing for appellate court, 34 Bull 270.

An appeal lies. Accounts—In action involving an adjustment of accounts, 50 O. S. 46; see 33 Bull 332.

Alimony. From a decree for alimony, 25 O. S. 71; § 5706.

Assessment. From a judgment in an action to enforce an assessment where no case for a personal judgment is made, 21 O. S. 277.

Assignment for creditors. In action to compel assignee to allow claim; 3 C. C. 433, 446; 4 *Id.* 196; 11 C. C. 278. Effect of death of assignee before perfecting appeal, 2 C. C. 61.

Attachment lien. In action to compel, 45 O. S. 222. In suit by attaching creditor of personal property in possession of sheriff under attachment to remove clouds upon it created by mortgage or otherwise, 29 Bull 88; 50 O. S.

Boundary. In case of disputed boundary, 33 O. S. 537.

Contribution. From judgment in action for contribution among co-sureties, 18 O. S. 1. *Contract*. Specific performance, 35 Bull 216.

Co-tenant. In action by one co-tenant against another for rents and profits under § 5774; 38 O. S. 467.

Cross-petition. From judgment on cross-petition in equity, 17 O. S. 596; 30 O. S. 50; 37 O. S. 113; see 35 Bull 276.

Distribution. From an order of distribution in an equity case allowing to a wife a sum of money in lieu of homestead, 34 O. S. 42. Appeal by one distributee from decree of distribution of proceeds of foreclosure carries up whole case, 4 C. C. 296.

Dower. From final order in dower proceedings, 43 O. S. 390.

Equity Jurisdiction. From a judgment in which the facts stated and the relief demanded are within the sole jurisdiction of a court of equity, though plaintiff demands a money judgment, 27 O. S. 47, and though as between some of the defendants there were other issues made by cross-petition answer and reply on which a jury trial might have been demanded, 40 O. S. 468. Where plaintiff's cause of action is triable by jury and defendant sets up new matter constituting an equitable

cause of action which, if established, will extinguish or supersede the case made in the petition, 26 O. S. 514; and if plaintiff sets out in his petition an equitable cause of action and the defendant sets up new matter constituting a legal cause of action triable by jury, the plaintiff may appeal from a decree in such case dismissing his petition, though the decree is based upon a finding that the sum due on the legal cause of action is equal to or exceeds that claimed in his petition and thus extinguishes it, 2 C. C. 553; see 6 C. C. 580; but such appeal does not open for re-trial in the circuit court the issues joined and tried in the common pleas upon the new matter set out in defendant's answer, *Id.* Where a case has been treated by the parties and the courts below as an equitable action and has been tried by the district court on its merits without objection the supreme court will not *sua sponte* consider the question of error in entertaining the appeal, 36 O. S. 181. Generally, 4 C. C. 494.

Foreclosure. From a decree in an action against a mortgagor and his grantee for foreclosure, though a personal judgment is asked against the mortgagor for the mortgage debt, 31 O. S. 568; but where the plaintiff demands a judgment against the defendant for the amount due upon the mortgage and issues of fact are joined therein, the action is triable by jury and there is no appeal, 23 O. S. 579; see 7 C. C. 308, *contra* where illegal interest was the only matter in controversy, the amount due being admitted by defendant, 43 O. S. 220; although an issue of fact may be joined on plea by garnishee that he had paid the mortgage indebtedness before notice of garnishment was served on him, 45 O. S. 653.

Fraud. From judgment in action to impeach decree or judgment for fraud, 23 O. S. 415; from judgment in case in which heirs sue an administrator charging fraud in his accounts, 25 O. S. 42.

Guardian and Ward. From order of probate court overruling motion of imbecile ward to terminate guardianship because letters were improperly issued and he has since been restored to reason, 45 O. S. 702.

Injunction. From decree granting a perpetual injunction, though damages are asked, 31 O. S. 209; from interlocutory order dissolving, 31 O. S. 561. See 5 C. C. 557; 34 Bull 270.

Lien holders. Several claiming priority against fund, 7 C. C. 276. When personal judgment and enforcement of mechanic's lien are asked, the cause is not appealable, 7 C. C. 308.

Mandamus. From judgment on petition in, 42 O. S. 215; 1 C. C. 127.

Married woman. From a judgment in an action to subject the separate estate of a married woman to the payment of a note executed by her, 35 O. S. 270; see 45 O. S. 653, 657. In action by husband against wife for support, 6 C. C. 490.

Master Commissioner. From judgment based upon the finding of a master commissioner upon issues joined of an equitable nature, 37 O. S. 113, as from a judgment on report of a master on a settlement of a partnership account, 26 O. S. 439, 567, (but the overruling of a motion at a subsequent term to open up the judgment is not the subject of appeal, *Id.* 439.)

Partition. From an order in partition under the statute in which equitable relief is demanded, 21 O. S. 527; 29 O. S. 440; 53 O. S. 128; (not formerly 15 O. S. 460,) although the petition states no equitable grounds for relief, 49 O. S. 374.

Reformation. From judgment in action for reformation of contract and damages, 28 O. S. 66.

Sale. In action to set aside by executor, 32 O. S. 358.

Stockholder. From judgment against company, 47 O. S. 116.

Surety. To compel payment, 45 O. S. 133, 138. See 5 C. C. 404.

Title. Action to quiet, 5 C. C. 583.

Vacating judgment. In proceedings for, after close of term where answer traverses material averments of fact, 29 Bull 341.

Waste. In an action to enjoin waste, for forfeiture and an account of rents, 21 O. S. 362.

Will. From judgment in action asking for the construction of a will and sale of lands, 24 O. S. 1.

No appeal lies from a judgment on an award of arbitrators, 42 O. S. 312; from an order refusing confirmation of a sale, 13 O. S. 574 (overruling 16 O. 274; 7 O., Pt. 2, 49); from proceedings in contempt, 3 Bull 433; from decrees for divorce, § 5706; from a final judgment where the common pleas had no actual original jurisdiction, 8 O. S. 199, 205; where, though equitable relief is demanded, the action is primarily for money, and a personal judgment is sought, 30 O. S. 374; in an action for money where a third party claiming is substituted for defendant, 24 O. S. 336; from an order of the common pleas, in which it is sought to enjoin proceedings for the annexation of territory to a municipal corporation, 29 O. S. 562; where the facts constituting a cause of action entitle the party to no other relief than a personal judgment, though other relief was prayed for and granted, 26 O. S. 497; from a judgment under § 5358 in a proceeding to vacate a judgment rendered by the common pleas at a former term and reinstate the case on the docket for trial, 12 O. S. 169; from the decision of the common pleas in a proceeding to contest the election of a county officer, 31 O. S. 451; from an order appointing a receiver and directing him to bring the funds into court, subject to its order, no application of the funds, except as to the costs, being provided for, 10 O. S. 622; from an order that a case be stricken from the docket for want of service or non-payment of costs, 7 O. S. 233; from a judgment in a proceeding to contest the validity of a will, 1 C. C. R. 476 (formerly there was an appeal in such a proceeding, 10 O. S. 417; 2 W. L. M. 84); from an interlocutory order *modifying* an injunction, 1 C. C. R. 417, where the answer raised an issue of fact, though there was an agreement between the parties to refer certain matters in dispute to a referee, 41 O. S. 402, 403; from a case appealed from the probate to the common pleas court, 6 Bull 754; or pending in the probate court and under § 6199 reserved and sent to the common pleas, 4 C. C. 220. In a suit by a debtor to have the adverse rights of those who claim the amount he owes determined and such claimants intervene for that purpose, 5 C. C. 16; in an action under § 5021 against a party personally liable for the debt secured by the lien where no equitable issue is made by subsequent pleadings, 7 C. C. 5; from a judgment in an action for money though plaintiff prays for a discovery, an account due and that an equitable lien may be enforced, 45 O. S. 356. Where a personal judgment and the enforcement of a mechanic's lien are asked, the cause is not appealable, 7 C. C. 308.

§ 5227. *Notice of appeal. Time of filing bond.* A party

desiring to appeal his cause to the circuit court shall, within three days after the judgment or order is entered, enter on the records notice (1) of such intention, and, within thirty days after the entering of such judgment or order upon the journal of the court, (2) give an undertaking with sufficient surety, to be approved by the clerk (3) of the court or a judge thereof, as hereinafter provided. [89 v. 148; 54 v. 122, § 2, S. & C. 1162.]

1. The notice must be entered at the term, 10 O. 202; (*now* within three days after the judgment is entered), on the journal, W. 495. Entry in the docket, 10 O. 197, or on the judge's calendar, 1 Clev. R. 89, will not suffice. Notice handed to the clerk at his residence is not sufficient, 2 Bull 115. Notice before repealing act saves the appeal, 2 W. L. J. 427; see 6 O. S. 174. 2. After regular term, 4 O. S. 469; given on the 30th sufficient, 10 W. L. J. 74; the 31st, 4 C. C. 138; see 19 O. 106; the language of the statute then was "within thirty days after the rising of the court," see 7 C. C. 403. 3. See under former statute W. 95; 22 O. S. 527.

If no bond is given, the court acquires no jurisdiction, and the objection can be taken at any time, 6 O. 480. Appeal must be taken by party, 16 O. 445. Notice of intention to appeal all parts of the principal case is sufficient notice of intention to appeal the whole case, 14 O. S. 551. Notice of intention to appeal must be entered on journal whether appeal bond required or not, 6 C. C. 650. If notice of appeal and bond given, the case is *eo instanti* in the circuit court, though the clerk has journalized neither the decree nor notice of appeal, 6 C. C. 31. Mandamus to compel clerk to enter upon journal fact that court has fixed amount of bond, *Id.* Notice of appeal must be as to all parties necessary to determination of controversy, 7 C. C. 276. Where an appeal from the court of common pleas to the circuit court has been taken by one or more of the parties, a motion to dismiss such appeal as to other parties in the case who either gave notice of their intention to appeal but gave no bond therefor, or who gave neither notice nor bond, will be overruled, when such parties have not appeared in the circuit court, or by the filing of pleadings or other papers, or in some other way assumed that they are proper parties, 7 C. C. 364.

§ 5228. Who not required to give bond. A party in any trust capacity, who has given bond in this state with sureties according to law, shall not be required to give bond and security to perfect an appeal (1); and in such case, the clerk of the common pleas court, at the expiration of thirty days from the entering of such judgment or order upon the journal of the court, shall, if not otherwise directed, make a transcript (2), which together with the papers and pleadings filed in the cause he shall transmit to the clerk of the cir-

cuit court as in other cases of appeal. [89 v. 148.]

Section seems not applicable to appeals from justices, 52 O. S. 203.

1. No bond necessary when appeal is in the interest of a trust, 3 C. C. 448. 1 O. 513; W. 157; but not when he has not given official bond in this state, W. 631; 6 O. 503 (see 1 Clev. R. 9; 5 Bull 414), though the will under which he acts excuses him from giving bond, 29 O. S. 433. 2. Whether an appeal is filed in time or not, must be determined from the transcript; the recitals of the appeal bond can not be looked at. 17 O. S. 30.

§ 5229. When party dies before appeal is perfected. When a party to a judgment has given notice as aforesaid, and dies within the time limited for the appeal, and before perfecting the same, the administrator or executor of such deceased party, at any time within thirty days after his appointment and qualification, and within ninety days after the death of such party, may cause notice of his intention, as such administrator or executor, to appeal the cause, to be entered upon the journal of the court; and such administrator or executor shall thereby be made a party to the judgment, and the appeal shall be considered as perfected. [54 v. 122, § 2.]

Former statute 3 O. 274.

§ 5230. Penalty of bond. When court to fix amount. When the judgment is personal against a party for the payment of money only, the penalty of the appeal bond shall be double the amount of the judgment (1); in all other cases, including cases in which the judgment is against a party for nominal damages and costs, or for costs only, the court shall, at the time of the rendition of the judgment, ascertain and fix the penalty of the appeal bond to be given in the event of an appeal, at such reasonable amount as will, in the opinion of the court, be sufficient to cover the probable loss, damage, or injury, which the other party or parties may sustain by the delay, and the costs and damages which may be awarded in the appellate court (2). [50 v. 93, § 3; S. & C. 1164.]

1. The sureties must be worth, in the aggregate, beyond the amount of their debts, double the amount of the penalty of the bond, and not merely double the amount of the judgment, 5 Bull 711; 9 Rec. 304. The bond must be for double the amount of the judgment, including costs, 5 O. 276, 337. 2. A refusal or failure by the court to fix the amount of the bond does not deprive the party of his appeal, 38 O. S. 405; 1 O. S. 171; 10

W. L. J. 496; contra, Id. 72; and where the court, having power to fix the amount, placed it at a less sum than the decree appealed from, this afforded no ground for dismissing the appeal, 14 O. S. 551; 6 C. C. 31, 35; 7 C. C. 5. Objection to the amount to be made when fixed, W. 741; see 1 C. C. R. 550, 555.

§ 5231. **Condition of bond. To whom payable.** The appeal bond shall be payable to the adverse party, or otherwise, as may be directed by the court, where the conflicting interests of the parties require it, and shall be subject to a condition to the effect that the party appealing shall abide and perform the order and judgment of the appellate court, and shall pay all money, costs, and damages which may be required of or awarded against him by such court. [50 v. 93, § 3; S. & C. 1164.]

Appellee need not be named, 13 O. S. 485 (justice's code).

§ 5232. **Appeal of separate interest.** When the interest of a party desiring an appeal is separate and distinct from that of the other party or parties, and he desires to appeal the part of the case in which he is interested, it shall be so allowed by the court, and the penalty and condition of the bond shall be fixed accordingly; and the court shall make such order, as to the papers and pleadings, the supplying of copies thereof, and in all other respects, in view of a division of the case for the purpose of appeal, as it deems right and proper. [50 v. 93, § 4; S. & C. 1166.]

1 O. S. 202, 204; see 20 O. 512; 1 O. 513. One of two or more defendants, against whom *jointly* a judgment has been rendered in the common pleas, may appeal the case to the district court, and his appeal will vacate the judgment, and take up the whole case. To perfect the appeal in such case, it is not necessary for the appellant to give bond that will cover the faults of his co-defendant; it is sufficient if it cover his own, 4 O. S. 210 (Swan's Stat. 717). Appeal brings up whole case as to party appealing, 5 Bull 517. See 4 C. C. 296. Can not appeal from only part of decree, 6 Bull 338; 4 C. C. 375; 14 O. S. 557. Assignee, 52 O. S. 494, 499.

§ 5233. **Amendment or renewal of appeal bond.** When the surety in the undertaking for the appeal has removed from the state, or for any cause is insufficient, or if the undertaking is insufficient in form or amount, the circuit court, on motion, may order a change or renewal of the undertaking, or a new undertaking to be given, with security, to be approved by the circuit court, or the clerk thereof; and if the order of the circuit court be complied with, the appeal shall not be dismissed, but the

court shall hear and determine the cause in the same manner as if the order had not been made; but otherwise the appeal shall be dismissed. [82 v. 32; 54 v. 95.]

Application a "proceeding" within meaning of § 5114. 4 C. C. R. 35. A defective bond may be amended or a new bond given, 6 O. S. 81; 28 O. S. 90, 96 (not subscribed by plaintiff); see 31 O. S. 131, 331; W. 164; 1 O. S. 171; 11 O. 420; 10 O. S. 579. If the bond complies substantially with the requisites of the statute, it is sufficient, 10 O. S. 579; 11 O. S. 398; 1 O. 170; see 35 O. S. 638; but that which gives jurisdiction and may be amended must be a bond, 6 O. S. 501; 16 O. S. 1. Bond amendable, 29 Bull 226.

§ 5234. When execution may be stayed. The court may, on motion of the party entering notice of appeal, on such reasonable terms as may be necessary for the security of the adverse party, direct execution to be stayed for thirty days. [50 v. 93, § 6; S. & C. 1167.]

§ 5235. Suspension of judgment on appeal. When an appeal is taken, and bond given, the judgment is thereby suspended, unless some part of the final judgment appealed from be an injunction, in which case such injunction shall not be suspended, except by order of the circuit court, or two judges thereof, on reasonable notice to the adverse party; and the clerk of the common pleas court shall forthwith make an authenticated transcript of the docket and journal entries, and of the final judgment in the cause appealed; which transcript, together with the original papers and pleadings, he shall deliver at the office of the clerk of the circuit court, on or before the first day of the term thereof next after the appeal is perfected; and either party may require a full record to be made of the case in the court below, at his own costs. [82 v. 32; 50 v. 93, § 9; S. & C. 1168.]

An appeal takes the whole case out of the jurisdiction of the lower court, and after appeal the lower court has no power to set aside its judgment, 1 C. C. R. 479. An appeal vacates rulings on demurrer as well as final judgment, and the appellate court should try again the question of law made by the demurrer, as also the issue of fact, 30 O. S. 378; 29 O. S. 440. Appeal taken in final decree dissolving a preliminary injunction, continues the injunction still in force, 6 Bull 138. An appeal will not be dismissed because of the neglect of the clerk to file transcript within time fixed by law, 6 Bull 722. Right to stay of injunction on appeal until case heard on its merits, 7 C. C. 182. If notice of appeal and bond has been given the case is *eo instanti* in the circuit court although the clerk has journalized neither the decree nor notice of appeal, 6 C. C. 31. Reasonable notice re-

quired, but the practice seems to be uniform in holding that the power is discretionary and will only be exercised upon good cause shown, 7 C. C. 182. Error can not be concurrently maintained, 11 C. C. 396.

§ 5236. Lien of judgment on appeal to circuit court continues. When the party against whom a judgment is rendered appeals his cause to the circuit court, the lien of the opposite party on the real estate of the appellant, created by the judgment, shall not be removed or vacated by the appeal; but the real estate of the appellant shall be bound, in the same manner as if the appeal had not been taken, until the final determination of the cause in the circuit court. [82 v. 32; 50 v. 93, § 7; S. & C. 1168.]

See § 5376.

§ 5237. Costs on appeal to circuit court. If a plaintiff appealing do not recover a greater sum in the circuit court than in the court from which the appeal was taken, exclusive of costs and interest accrued since the rendition of the judgment, he shall pay all costs that accrue in the circuit court; and if the defendant, in any personal action, appeal to the circuit court, and the plaintiff recover the same or a larger sum than was recovered in the court below, exclusive of costs, the circuit court shall render judgment for the sum so recovered, with costs of suit. [82 v. 32; 50 v. 93, § 8; S. & C. 1168.]

Under former statutes, 3 O. 72; 13 O. 133, 248.

§ 5238. Damages when appeal is for delay merely. When the appellate court renders substantially the same judgment which was rendered in the court below, damages may be awarded as follows: When the judgment is for the payment of money, the appellant shall be adjudged to pay the appellee, or party delayed of payment by the appeal, damages at the rate of five per cent. on the amount adjudged in the court below, unless the appellate court is satisfied that there was reasonable ground for the appeal; and in such case, when the court is satisfied that the appeal was for the purpose of delay merely, the damages adjudged shall be at the rate of ten per cent.; in all other cases, including those where the

judgment or decree is for nominal damages and costs, or costs only, unless the appellate court is satisfied that there was reasonable and probable ground for the appeal, damages shall be adjudged to the appellee, or party affected by the appeal, in such specific sum as may be deemed reasonable, not exceeding two hundred dollars. [50 v. 93, § 5; S. & C. 1167.]

§ 5239. **Mandate to common pleas.** When the circuit court makes a final order, or renders a final judgment, in cases brought before it on appeal, it may enforce the same by process issued therefrom, or may remand the same to the common pleas court for execution or other process; the clerk of the circuit court shall certify the same to the common pleas court, and the clerk of the common pleas court, on receipt of the certified transcript, shall immediately enter the same on the journal; and the judgment or order so entered, unless otherwise directed by the circuit court, shall, for the purpose of execution and other process, stand as the judgment of the common pleas court. [82 v. 33; 67 v. 29, § 1.]

See §§ 549, 6726. An authenticated mandate from the district court of the judgment remanding the case to the court of common pleas for further proceedings can not be impeached in the latter court by showing that the clause remanding the case was not part of the order of the district court, but was added to the judgment without its authority, 37 O. S. 10; see 1 C. C. R. 479. *Quære* whether common pleas can order mandate to be recorded as of date prior to proceedings in that court and subsequent to reversal, 6 C. C. 221; cited in 9 C. C. 117.

CHAPTER III.

EVIDENCE.

SUBDIVISION I. COMPETENCY OF WITNESSES.

§ 5240. **Who are competent witnesses.** All persons are competent witnesses, except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly. [51 v. 57, § 310; 67 v. 113, § 314; S. & C. 1035.]

See § 7284. This subdivision does not apply to criminal cases, 20 O. S. 333. *Administrator, agent, assignor, attorney*, §§ 5241, 5242; defendant competent witness in *bastardy*, 9 O. S. 402, and complainant in *bastardy* as to contents of lost complaint, 26 O. S. 7. *Contestant of will*, 29 O. S. 85. *Deaf person*, W. 631. *Grantor and grantee*, 18 O. S. 73; 13 O. S. 263; 41 O. S. 368. *Hus-*

band and wife, §§ 5241, 5242. *Juror*, as to what claims were allowed by the jury under a plea of payment, 6 O. 227; W. 261. *Justice of the peace*, as to the incompetency of grantor in a deed, the acknowledgment of which he has taken, 14 O. S. 144; but he can not testify in cases tried before him unless parties consent, 10 O. S. 112. *Law at date of trial* governs competency, 27 O. S. 22; 25 O. S. 500; see § 79 R. S. *Mortgagor* may testify as to usurious interest paid to deceased mortgagee on issue joined, 41 O. S. 178. *Owner*, in proceeding to appropriate property, 4 O. S. 583; as to loss of paper, W. 688; contents of trunk, 20 O. 318. *Stockholder*, 1 O. S. 206 (act 1850). *Waiver of incompetency* lasts throughout trial, 3 O. S. 424. *Widow* competent, in action by heirs to recover land, to prove execution of deed by husband, 42 O. S. 211. *Wife*, as to services rendered her while wife of former husband, 15 O. S. 172 (1864). Religious belief does not disqualify, Const. Art. 1, § 7.

§ 5241. Privileged communications. Attorney and client, physician and patient, husband and wife, assignor, etc. The following persons shall not testify in certain respects:

1. An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient; but the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testify, the attorney or physician may be compelled to testify on the same subject.

2. A clergyman or priest, concerning a confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

3. Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness, and the rule shall be the same if the marital relation has ceased to exist.

4. A person who assigns his claim or interest, concerning any matter in respect to which he would not, if a party, be permitted to testify.

5. A person who, if a party, would be restricted in his evidence under § 5242, shall, where the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, be restricted in the same manner in any action or proceeding

concerning such property or thing. [51 v. 57, § 315; 67 v. 113, § 314; S. & C. 1038.]

1. *An attorney, concerning a communication made to him by his client in that relation, etc.*, 11 O. S. 261; 34 O. S. 91, unless the client consents, *Id.*, 4 Bull 576, or testifies himself, 11 O. S. 261. The rule does not apply where the attorney derived his knowledge from other sources, W. 136, and does not extend to an injustice of the peace, 3 Bull 845; see 44 O. S. 679. Physicians, see 43 N. Y. 125; 21 Wend. 79; 99 N. Y. 56; 21 O. S. 536.

2. 13 Wend. 311.

3. *Husband or wife, as to confidential matters, etc.*, 22 O. S. 527; 4 O. S. 513; and the removal of interest of husband or wife does not render either competent, 10 O. S. 418, but if the communication was made or act done in the known presence or hearing of a third person, 25 O. S. 500; 33 O. S. 444; 36 O. S. 595; 37 O. S. 402, competent to be a witness at the time the act was done, *Id.*; 4 Bull 218; though such third person is not living at the time of the trial, 89 O. S. 259, they are rendered competent. Evidence that a third person was present and known to be present at the time of making such communications, or doing such acts, is for the court, and on error will be presumed to have been given to the court, unless the contrary appears, 25 O. S. 500, and the presence of such third person is provable by husband or wife, 36 O. S. 595. Under a former amendment providing that husband and wife shall be incompetent to testify for or against each other, "except in actions where the wife, were she a *femme sole*, would be plaintiff or defendant, in which action the wife may testify," in an action against her and her husband, it was held she could testify as to services rendered her while wife of a former deceased husband, 15 O. S. 172 (1864). The husband is a competent witness to prove the wife's handwriting in letters addressed to him, 42 O. S. 23, and is a competent witness as to slander of wife in his presence, 32 O. S. 604. Husband and wife are held not competent witnesses for or against each other in criminal prosecutions, 20 O. S. 333; see § 7284 R. S.; 21 Bull 292; 3 C. C. R. 431.

4. *A person who assigns his claim.* But in an action by the indorsee of a promissory note against the maker, the executor of the maker may compel the payee and assignor of the note to testify to facts that occurred prior to the death of testator, 44 O. S. 596; 17 Bull 100, reversing 1 C. C. R. 577. Under the code, as originally adopted, the assignor of a chose in action was a competent witness for the assignee in an action by him against an administrator of the debtor, to prove any fact in the case, whether occurring before or after the death of the debtor, 9 O. S. 558, 559.

§ 5242. **When party shall not testify. Exceptions.** A party shall not testify where the adverse party is the guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee, of a deceased person, except:

1. To facts which occurred subsequent to the appointment of the guardian or trustee of an insane person,

and, in the other cases, subsequent to the time the decedent, grantor, assignor, or testator died.

2. When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness, a party may testify on the same subject.

3. If a party, or one having a direct interest, testify to transactions or conversations with another party, the latter may testify as to the same transactions or conversations.

4. If a party offer evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions.

5. In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with, or admissions by, a partner or joint contractor since deceased, unless the same were made in the presence of the surviving partner or joint contractor; and this rule shall be applied without regard to the character in which the parties sue or are sued.

6. If the claim or defense is founded on a book account, a party may testify that the book is his account book; that it is a book of original entries; that the entries therein were made by himself, a person deceased, or a disinterested person, non-resident of the county; whereupon the book shall be competent evidence, and such book may be admitted in evidence in any case, without regard to the parties, upon like proof by any competent witness.

7. If a party, after testifying orally, die, the evidence may be proved by either party on a further trial of the case; whereupon the opposite party may testify to the same matters.

8. If a party die, and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein.

Nothing in this section contained shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil; and when a case is plainly within the reason and spirit of the last three sections, though not within the strict letter, their principles shall be applied. [82 v. 125; 74 v. 161, § 313; 72 v. 77.]

Party incompetent when opposite party is guardian of imbecile, 4 C. C. R. 1.

1. *Facts occurring subsequent to appointment.* Though not to facts occurring prior to the appointment of such guardian, 29 O. S. 85, or to the death of testator or intestate, 13 O. S. 525; 11 O. S. 624; 22 O. S. 208; 2 D. 41, 46, though the testimony is submitted by deposition, 1 D. 517; 16 O. S. 220. But an administrator or executor may testify in his own behalf to conversations or transactions of deceased, 21 O. S. 658, and he is a competent witness for either party in a hearing on exceptions to his account, 16 O. S. 273. When the protection of the section was not extended to "adult heirs," it was held that a grantor, though a party, could testify in a suit by a judgment creditor against him and the heirs of his grantee, to prove fraudulent collusion between himself and the deceased grantee, 13 O. S. 268. Under the amendment, 71 v. 68, the words "or defends as heir, grantee," etc., were omitted from the section; and it was held that in a suit for dower, the heir of a deceased husband was a competent witness for the defense where the title of the deceased husband was in issue, 33 O. S. 203. In the amendment, 68 v. 127, the word "assignee" was not included, and the provision of the section was held not to apply to an assignee of a chose in action, 82 O. S. 431. Under the code as originally adopted, the assignor of a chose in action was a competent witness for the assignee in an action by him against an administrator of the debtor to prove any fact in the case, whether occurring before or after the death of the debtor, 9 O. S. 559.

Id.—parties. The parties intended to be excluded from testifying by this section are the real, and not mere formal, nominal, and wholly unnecessary, parties, 30 O. S. 476. The parties must be adverse in interest, and not merely in their nominal status, 29 O. S. 663, Welch, J. 665. Both the party disqualified and the adverse party referred to, must be parties to the record, adversely interested in the determination of the issues of fact, and they must be so related to the action and the issues at the time of trial, but it matters not whether they stand upon the same side or opposite sides of the record, 22 O. S. 221, McIlvaine, J. Accordingly it has been held that a grantor, not a party to, and having no interest in, the controversy, adverse to defendant, 18 O. S. 73 (see 41 O. S. 868; *infra*, subdiv. 8), or parties in interest, who have not been made parties to the action, 8 Rec. 360, as heirs and legatees, who will derive the chief benefit from the result of the suit, 3 Bull 590, are not disqualified. So a party to a suit in default for answer is not adverse in interest, but may be called as a witness by his co-defendant who has answered, 29 O. S. 663; 9 Bull 294; 17 O. S. 640; see 50 O. S. 682; and by analogy a party who sets up, by supplemental answer, his discharge in bankruptcy, which is admitted by the reply, becomes a competent witness for his co-defendant, 9 Bull 296. So where there are two parties, plaintiffs or defendants, claiming several interests under the same title or state of facts, and the adverse party is a competent witness against one, but incompetent under this section against the other, and the case is one in which separate judgments may be rendered, the testimony of such party may be received as against the party as to whom the witness was competent, 22 O. S. 208. And, for the same reason, in an action against a married woman and others, where her husband is incompetent to testify for or against her, he is a competent witness for a co-defendant, if the case be one in which separate judgments may be rendered, 24 O. S. 402. It

would seem that it is the duty of an administrator or executor to object to the testimony of the opposite party prohibited by this section, or even of the court to interfere, 1 H. 13, 14, 18; but where the testimony of a party is heard, subject to general objection to his competency, because the adverse party is the executor of a deceased person, and it does not appear whether the event testified to occurred before or after the death of the testator, and the executor makes no motion to strike out the testimony, but presents counter evidence, without further insisting on his objection, it will be presumed that the party is a competent witness, 8 Bull 29. Waiver of objection, 12 Bull 246.

2. 2 Bull (sup.) 5, 6.

3. *Where an administrator testifies, etc., the adverse party may also to the same facts*, 38 O. S. 438; 3 C. C. R. 508.

5. 28 O. S. 84. Unless the same were made in the presence of the survivor, 41 O. S. 334.

6. *Book account must be book of original entries*, 28 O. S. 84; and co-temporaneous with transaction, 4 C. C. 289. Attacking correctness, 5 C. C. 20.

8. *If a party die and his deposition be offered in evidence, etc.* See 11 O. S. 624. The provisions of the section shall not apply to proceedings involving the validity of a deed or will, 1 C. C. R. 16, 17. Under the amendments, 68 v. 127 and 72 v. 77, this clause read, "provided that nothing herein contained shall be so construed as to prevent any and all the heirs, grantees, and legatees from testifying in cases to contest the validity of, or to set aside, a will or deed of any ancestor or grantor under whom they may claim title." Under 68 v. 127, it was held that this section did not make the husband of an heir who was joined with her as a plaintiff in an issue of *devisavit vel non* incompetent as a witness for the contestants, 30 O. S. 472. Under 72 v. 77, it was held, the heirs, legatees, and grantees who are declared competent witnesses by the proviso are such as derive title from the same persons, and that where a person does not claim under a will or deed he must, to come within the proviso, claim as heir of the testator or grantor whose will or deed is sought to be set aside, 31 O. S. 188.

"*And when a case is plainly within the reason and spirit of the last three sections, etc., their principles shall be applied.*" Under this clause it has been held that a defendant is a competent witness to transactions with a deceased agent of plaintiff, though not occurring in his presence, if within the scope of such agent's authority, 39 O. S. 314; Okey, J., dissenting. "The omission of agents, a class whose members equal, if they do not exceed, all the others combined, was evidently intentional. To so construe the last clause of paragraph 8, § 5242, as to add agents to said enumerated classes would be judicial legislation," 41 O. S. 401, 402. Under this clause it has also been held that parties claiming under a conveyance from a deceased insolvent mortgagor are competent witnesses against each other as to whose lands shall be charged first, 42 O. S. 305; that a widow is a competent witness to prove the execution and delivery by her husband of a deed in an action by the heirs to recover the land, 42 O. S. 211; and where a grantee holds the legal title in trust for the grantor, and without the knowledge of the grantor conveys the land to another upon the same trust, in an action by the grantor against the heirs of the second grantee to enforce the trust,

the first grantee is a competent witness for the first grantor against the heirs of the second grantee to establish the trust, 41 O. S. 368. Party can testify where adverse party is trustee, etc., 1 C. C. R. 16; validity of deed, 8 C. C. 163.

Miscellaneous. Where a witness offered is improperly rejected as incompetent to testify, it will be presumed that the party offering the witness has been prejudiced by his exclusion though the facts he was expected to prove are not shown by the record, 30 O. S. 472; 9 O. S. 1. Where one is offered as a witness for a purpose for which he is incompetent and is rejected on that ground, the fact that he was so offered and rejected is no ground for excluding him when he is offered for a purpose as to which he is competent, 17 O. 590. It is inadmissible for the purpose of impeaching the credibility of a competent witness to prove by other witnesses that such witness is not possessed of ordinary intelligence, 16 O. S. 45. It is discretionary with the court to refuse or permit a witness to testify who in disobedience of an order of the court, remains and hears the testimony of other witnesses, 18 O. 99; by connivance of party calling him, 39 O. S. 73. When a witness who has testified in a cause is dead, on a trial of the same cause between the same parties, another witness may testify as to the substance of what the deceased witness testified on the former trial, 17 O. 439. Vendor's agent may testify though vendee deceased, 50 O. S. 648.

§ 5242a. When oral testimony of a party or witness who fails to appear on further trial of case may be proven.

Whenever a party, or a witness, after testifying orally, die, or is beyond the jurisdiction of the court, or can not be found after diligent search, or is insane, or through any physical or mental infirmity is unable to testify, or has been summoned, but appears to have been kept away by the adverse party, if the evidence given by such party or witness has been or shall be incorporated into a bill of exceptions in the case wherein such evidence was given, as being all the evidence given by such party or witness, and which bill of exceptions shall have been duly signed by the judge or court before whom such evidence was given, the evidence so incorporated into such bill of exceptions may be read in evidence by either party on a further trial of the case, and in case no bill of exceptions has been taken or signed as aforesaid, but the evidence of such party or witness has been taken down by any competent official stenographer, the evidence so taken by such stenographer, may be read in evidence by either party on the further trial of the case, and shall be deemed and taken as *prima facie* evidence of what such deceased party or witness testified to orally on the former trial, or if such evidence

has not been taken by such a stenographer, the same may be proven by witnesses who were present at the former trial, having knowledge of such testimony. All testimony thus offered shall be open to all objections which might be taken, if the witness were personally present. [89 v. 142.]

§ 5243. Cross-examination of party. A party may be examined as if under cross-examination, at the instance of the adverse party, either orally, or by deposition, as any other witness; but the party calling for such examination shall not be concluded thereby but may rebut it by counter-testimony. [91 v. 86; 51 v. 57, § 312; S. & C. 1037.]

3 W. L. M. 31; 44 O. S. 596, under former statute.

§ 5244. How laws of other states proved. Printed copies of written law enacted by any other state, a territory, or a foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts or tribunals of such state, territory, or government, shall be admitted by the courts and officers of this state, on all occasions, as presumptive evidence of such law (1); the unwritten or common law of any other state, or of a territory, or foreign government, may be proved as facts by parol evidence (2); and the books of reports of cases adjudicated in their courts may also be admitted as presumptive evidence of such law. [51 v. 57, § 362; S. & C. 1046.]

1. 44 N. Y. 27; 19 Abb. 416; 6 Wend. 475; 5 Wend. 375; 6 Abb. n. s. 215. 2. 5 N. Y. 447; 58 N. Y. 562; 56 N. Y. 162; 1 Johns. 385. According to our decisions, the existence, construction, and legal effect of foreign statutes and laws are matters of fact, 15 O. S. 68; 11 O. S. 690, 691; 11 O. 255, of which judicial notice will not be taken, 32 O. S. 163, and which must be pleaded and proven, 40 O. S. 842, 843; 26 O. S. 131; 2 C. C. R. 387, 400; 48 O. S. 634; 10 C. C. 139.

§ 5245. How copies of certain public documents made competent evidence. Copies of papers, books and records, on file or deposited, by virtue of any law, in the office of the governor or secretary of state, and certified by the secretary of state under the great seal, or in the office of the board of public works, certified by the president of the board, or in the office of the auditor of state, certified by him under his seal, (1.) or in the office of the surveyor of lands lying within the Virginia military district, certified and sworn to by him, and copies of entries, surveys, and plats of

lands in the Virginia military district, procured to be made by the commissioners of any county, and deposited with the recorder of such county, and certified by him, and the copies of such entries, surveys, and plats, now in the office of the auditor of Union county, and copies of any books, maps, records, papers or documents on file or deposited in any of the executive departments of the United States Government, authenticated under the seal of such department, shall be competent evidence, and have the same force and effect as the originals would if produced. [91 v. 132.]

1. The statute making certified copies of the auditor of state evidence, authorizes their admission only where the originals would be competent, 11 O. 261, 262; see Board of Public Works, 50 O. S. 662.

SUBDIVISION II. MEANS OF SECURING ATTENDANCE.

§ 5246. **How attendance procured.** The clerks of the several courts, and judges of the probate courts, shall, on application of a person having a cause or other matter pending in court, issue a subpoena for witnesses, under the seal of the court, inserting all the names required by the applicant in one subpoena, which may be served by the sheriff, coroner, or any constable of the county, or by the party, or any other person; and when a subpoena is not served by the sheriff, coroner, or constable, proof of service shall be shown by affidavit, but costs of such service shall not be taxed. [51 v. 57, § 316; S. & C. 1038.]

§ 5247. **The subpoena.** The subpoena shall be directed to a person therein named, requiring him to attend at a particular time and place, to testify as a witness; and it may contain a clause directing the witness to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence. [51 v. 57, § 317; S. & C. 1039.]

§ 5248. **Subpoena on taking depositions.** When the attendance of a witness before an officer authorized to take depositions is required, the subpoena shall be issued by such officer. [51 v. 57, § 318; S. & C. 1039.]

§ 5249. **How subpoena served.** The subpoena shall be served either by reading, or by copy delivered to the witness, or left at his usual place of residence; but such copy need not contain the name of any other witness. [51 v. 57, § 319; S. & C. 1039.]

§ 5250. **Witness not compelled to attend out of county of residence. Exception.** A witness shall not be compelled to go out of the county where he resides, or is subpoenaed, except to an adjoining county, to testify in the trial of a civil case, except where cases have been removed from the county in which such witness resides by change of venue; providing, however, no witness shall be required to go out of the county in which he resides or is subpoenaed to so testify, in the trial of a civil case, unless the party subpoenaing him shall upon demand, pay him at the time he is subpoenaed, his regular mileage and per diem fees under provisions of law. Also, except where such witness is the official custodian of any paper or document necessary to be produced in the trial as evidence in any cause, which paper or document can not lawfully be attached as an exhibit to a deposition; in such last case the judge of the court in which such cause is pending, upon being satisfied of the necessity thereof, may by his order to that effect compel a witness from another county to bring such paper or document into his court to be used as evidence in such case. Provided, that any person subpoenaed to any other county as the official custodian, may demand the legal fees for attendance and mileage as in other cases, and that he need not attend unless such fees are paid. Nothing herein contained shall be construed to prevent the taking and use of depositions in cases of change of venue under the law, but no person shall be compelled to go out of his county to have his deposition taken. [90 v. 234; 88 v. 42; 82 v. 221; 51 v. 57, § 320; S. & C. 1039.]

§ 5251. **Right of witness to demand fees in advance.** A witness may demand his traveling fees and fee for one day's attendance when the subpoena is served upon him, and if the same be not paid, the witness shall not be obliged to obey the subpoena; and, when a witness has attended upon the court, he may in like manner demand his fees from day to day until discharged by the court. The fact of such demand and payment or non-payment shall be stated in the return by the officer; and if the witness be not discharged on the day he is notified to appear, then the fact of payment or non-payment shall be noted by the clerk in the witness book. [77 v. 216; 51 v. 57, §§ 321, 330; S. & C. 1039-40.]

§ 5252. Contempt of court by witness. Disobedience of a subpoena, a refusal to be sworn, except in case of a refusal to pay fees on demand, a refusal to answer as a witness or to subscribe a deposition, when lawfully ordered, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required. [51 v. 57, § 322; S. & C. 1039.]

Before the witness can be punished for contempt for refusal to answer a question he must be *ordered* by the court or officer to answer it, 15 Bull 197. The mere putting a question to the witness by the attorney for the party taking a deposition, and a failure to answer the question at the request of the attorney, the notary making no demand, request, or order to the witness, constitutes no contempt, and a committal therefor is illegal, *Id.* The witness must be *lawfully* ordered, 15 Bull 267. He is not bound to answer any question that will directly or indirectly criminate himself, and it would appear he has the right to determine whether the answer will have that effect, 10 O. 336. But a witness is not excused from giving his deposition under §§ 5265, 5266, on the ground that he is not interested in the action; that he is within the county in which the action is pending, and that he does not intend to depart; that he is in good health, and will be able to attend court as a witness when the case is reached for trial, 17 Bull 274; 22 Bull 250; 3 Bull 739 (see 12 Kas. 451; 15 *Id.* 366); *contra*, 15 Bull 267. Under this section no specifications in writing are required against a witness who is punished for contempt in refusing to answer questions put to her on the stand as a witness, 3 C. C. 263. The privilege of a witness to refuse to answer a question on the ground that it will tend to criminate her, can not be interposed solely by counsel, especially where the witness swears that to answer will not tend to criminate her, *Id.* A witness may not refuse to answer a question pertinent to the issue on the ground that the answer will tend to disgrace her, when it will not tend to criminate and the witness so testifies, *Id.* Notary public has no authority to enforce obedience to subpoena *duces tecum*, 4 Bull 457. Power of notary to commit a witness for contempt for refusing to answer questions, 50 O. S. 618.

§ 5253. Attachment against witness. When a witness fails to attend in obedience to a subpoena, the court or officer before whom his attendance is required may issue an attachment to the sheriff, coroner, or a constable of the county, commanding him to arrest and bring the person therein named before such court or officer, at the time and place to be fixed in the attachment, to give his testimony, and answer for the contempt; if the attachment is not for immediately bringing the witness before the court or officer, a sum may be fixed in which the witness may give an undertaking, with surety, for his appearance, which sum shall be indorsed on the back of the attachment, and if no sum is so fixed and indorsed, it shall be one hundred dollars; and if the witness was

not personally served, the court may, by a rule, order him to show cause why an attachment should not issue against him. [51 v. 57, § 323; S. & C. 1039.]

§ 5254. Proceedings for contempt of court by witness, and punishment. The punishment for the contempt mentioned in § 5252 shall be as follows: When the witness fails to attend in obedience to the subpoena, the court or officer may fine him in a sum not exceeding fifty dollars; in other cases the court or officer may fine the witness in a sum not exceeding fifty nor less than five dollars, or may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition; the fine imposed by the court shall be paid into the county treasury, and that imposed by the officer shall be for the use of the party for whom the witness was subpoenaed; and the witness shall also be liable to the party injured for any damages occasioned by his failure to attend, or his refusal to be sworn, to testify, or to give his deposition. [77 v. 45; 51 v. 57, § 324; S. & C. 1040.]

In proceeding for contempt in refusing to answer as a witness, the witness is not entitled to a jury trial, 3 C. C. 263. Power of court to remit fine and imprisonment during pendency of action, *Id.*, of notary to commit for contempt, 50 O. S. 618.

§ 5255. Release of witness imprisoned by an officer. A witness so imprisoned by an officer may apply to a judge of the supreme court, circuit court, common pleas court, or probate court, who may discharge him, if it appear that his imprisonment is illegal. [82 v. 33; 51 v. 57, § 325; S. & C. 1040.]

§ 5256. Proceedings on arrest of witness. Every attachment for the arrest or order of commitment to prison of a witness, by a court or an officer, pursuant to this chapter, must be under the seal of the court or officer, if the officer has an official seal, and must specify particularly the cause of the arrest or commitment; if the commitment is for a refusal to answer a question, such question must be stated in the order; and the order of commitment may be directed to the sheriff, coroner, or any constable of the county where the witness resides, or is at the time, and shall be executed by committing him to the jail of the county, and delivering a copy of the order to the jailer. [51 v. 57, § 326.]

3 C. C. R. 263; 31 Bull 39; 50 O. S. 618.

§ 5257. Examination of witness in prison. A person confined in prison in this state may, by order of a court

of record, be required to be produced for oral examination in the county where he is imprisoned; but in all other cases his examination must be by deposition. [51 v. 57, § 327; S. & C. 1040.]

§ 5258. **Custody of prisoner while deposition is being taken.** While a prisoner's deposition is being taken, he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking of the deposition. [51 v. 57, § 328; S. & C. 1040.]

§ 5259. **Witness not to be sued and served out of his county.** A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county while going, returning, or attending in obedience to a subpoena. [51 v. 57, § 329; S. & C. 1040.]

§ 5260. **Oath of witness.** Before testifying, the witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. [51 v. 57, § 331; S. & C. 1040.]

SUBDIVISION III. MODES OF TAKING TESTIMONY.

§ 5261. **How testimony of witness taken.** The testimony of witnesses may be taken:

1. By affidavit.
2. By deposition.
3. By oral examination. [51 v. 57, § 332; S. & C. 1040.]

§ 5262. **Kinds of testimony defined.** An affidavit is a written declaration under oath, made without notice to the adverse party; a deposition is a written declaration under oath, made upon notice to the adverse party; and oral testimony is that delivered from the lips of the witness. [51 v. 57, §§ 333, 334, 335; S. & C. 1040-41.]

§ 5263. **Affidavit used for what purpose.** An affidavit may be used to verify a pleading, to prove the service of a summons, notice, or other process in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law. [51 v. 57, § 336; S. & C. 1041.]

§ 5264. **Before whom affidavit may be made.** An affidavit may be made in or out of this state, before any person authorized to take depositions, and must be authenticated in the same way as depositions, except as provided in § 5107. [51 v. 57, § 337; S. & C. 1041.]

§§ 5269, 5270.

§ 5265. **When deposition may be used.** The deposition

of a witness may be used only in the following cases:

1. When the witness does not reside in, or is absent from, the county where the action or proceeding is pending, or by change of venue, is sent for trial.

2. When the witness is dead, or, from age, infirmity, or imprisonment, is unable to attend court.

3. When the testimony is required upon a motion, or where the oral examination of the witness is not required. [51 v. 57, § 338; 52 v. 27; S. & C. 1041, 1170.]

The opposite party may use a deposition when filed, T. 127, 651; 2 W. L. M. 388, though it is not used by the party taking it, W. 651. It is sufficient if the witness was competent when the deposition was taken, 2 W. L. J. 426; *contra*, 17 O. 44. A waiver of objection to the competency of a witness so as to allow his deposition to be taken in the case is a waiver during the whole progress of the case, and the objection can not be insisted on when the witness is called to give a second deposition in the same case, 3 O. S. 424.

1. But if the opposite party die after the deposition of a non-resident is taken, it can not be admitted under the rule in § 5242, 1 D. 517; 16 O. S. 220; 12 Bull 286

2. See 5 O. 279.

3. See § 5252*n*, referring to 17 Bull 274; 22 Bull 260; 3 Bull 739; 12 Kas. 451; *contra*, 15 Bull 267: See also 1 N. P. 127.

§ 5266. **Time when deposition may be taken.** Either party may commence taking testimony by deposition at any time after service upon the defendant. [51 v. 57, 339.]

See 11 C. C. 278.

§ 5267. **Testimony taken by referee, etc., may be used as a deposition.** Testimony taken in an action or proceeding, on the order of a court, by a referee, master commissioner, or special master commissioner, subscribed by the witness, and reported to the court by the officer, may be used as a deposition taken in the case. [64 v. 144.]

8 Rec. 364; 40 O. S. 345.

And is, after the decease of such witness, admissible in any subsequent trial of the case in court, 14 O. S. 434 (1863).

§ 5268. **Deposition in foreign suit.** Depositions may also be taken when the testimony is required in an action, cause, or matter pending before any court or authority without this state. [52 v. 27; S. & C. 1170.]

§ 5269. **Who may take depositions in the state.** Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or clerk of the circuit court, a judge or clerk of the common pleas court, a probate judge, justice of the peace, notary public, mayor, master commissioner, official stenographer of any court

in this state, or any person empowered by a special commission; but depositions taken in this state, to be used therein, must be taken by an officer or person whose authority is derived within the state, and, if to be used out of the state, they may be taken before a commissioner or officer who derives his authority from the state, district, or territory in which they are to be used. [86 v. 78.]

Stenographers, 7 Bull 270; § 481 R. S.

§ 5270. Who may take depositions out of the state. Depositions may be taken out of this state before a judge, justice, or chancellor of any court of record, a justice of the peace, notary public, mayor, or chief magistrate of any municipal corporation, a commissioner appointed by the governor of this state to take depositions, or any person authorized by a special commission from this state. [51 v. 57, § 341; S. & C. 1041.]

Clerk of court of record of sister state is not one of the officers authorized by this section to take depositions, 31 O. S. 646; 4 Neb. 368. Under stat. 1824 mayor of Alexandria, in District of Columbia, could not take, 5 O. 330. U. S. consul. 33 Bull 49.

§ 5271. Who can not take depositions. The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding. [51 v. 57, § 342; S. & C. 1042.]

§ 5272. Commission to take depositions. Any court of record of this state, or a judge thereof, may grant a commission to take depositions within or without the state, which commission must be issued by the clerk, and under the seal of the court granting the same; and the person or persons to whom it is issued must be named therein, and depositions under it must be taken upon written interrogatories unless the parties otherwise agree. [51 v. 57, § 343; S. & C. 1042.]

§ 5273. Notice to take depositions. Service. Written notice of the intention to take a deposition shall be given to the adverse party (1), except in cases in which it is to be taken under a special commission, and shall specify the action or proceeding, the name of the court or tribunal in which the deposition is to be used, and the time when and place (2) where it will be taken, and, in case the deposition of a party to the suit be taken, it shall not be used in his own behalf, unless the notice specified that his deposition would be taken (3);

the notice shall be served upon the adverse party, his agent or attorney of record, or left at the usual place of abode of such party or his agent (4), and the deposition shall only be used against such parties as are served with notice in one of the modes prescribed; the notice shall be served so as to allow the adverse party sufficient time, exclusive of Sundays, the day of service, and one day for preparation, to travel by the usual routes and modes of conveyance to the place named in the notice (5); and the examination may, if so stated in the notice, be adjourned from day to day. [58 v. 58, § 344; S. & S. 560.]

1. A deposition taken without notice can not be read, though service is impossible, W. 156, but where there is an appearance by the party or his attorney at the time and place of taking the deposition and a cross examination without objection, it is a waiver of any irregularity in giving notice, and indeed dispenses with the necessity of notice, 1 H. 15. And where, after a deposition was taken, new parties were made, and they filed no exceptions to the deposition at any time, and on the trial objected to it only on the ground of incompetency, it was held that they waived the objection that they had no notice of the taking of the deposition, 41 O. S. 368. 2. "The city of Cleveland" is definite enough, without giving the county and state, 2 W. L. M. 388, and if the time and place are given, the name of the officer need not be given, T. 137. Misnomer of the officer will not vitiate the notice, W. 636. It has been held that notice may be served to take depositions at the same time and place in different cases, 20 O. 119, 128 (1851). 3. But the objection is waived by an appearance and cross-examination, 1 H. 13, 15, or by going to trial without filing exceptions as required by §§ 5284, 5285, 9 Bull 156; 39 O. S. 100, 106. 4. Service by leaving a copy at attorney's office, or service on assistant attorney, is insufficient, 2 O. S. 593; 2 C. S. C. R. 63. Remedy, motion to strike deposition from files, though there has been delay unaccounted for in making it, 2 C. S. C. R. 63. 5. Notice on 21st November at Cincinnati to take at Little Rock, Ark., on 12th December, reasonable, 1 H. 400. Service at 5 P. M. to take at 2 to 5 P. M. next day, was held sufficient, when the distance was under twenty miles, 1 W. L. J. 394. It has been held that service may be proven in the deposition, 1 W. L. J. 394, or by one of the attorneys, though the notice was not attached to the deposition, 20 O. 119, but could not be proved by the party, 10 O. 397.

§ 5274. Notice by publication. When the party against whom a deposition is to be read is absent from or a non-resident of the state, and has no agent or attorney of record therein, he may be notified of the taking of the deposition by publication; the publication must be made for three consecutive weeks, in a newspaper printed in the county where the action or proceeding is pending, if one is printed therein, and if no newspaper is printed

therein, then in a newspaper printed in the state, and of general circulation in that county; and the publication must contain all that is required in a written notice, and may be proved in the manner prescribed in § 5051. [51 v. 57, § 345; S. & C. 1042.]

§ 5276. **By whom deposition to be written.** The deposition shall be written in the presence of the officer before whom it is taken, either by the officer, the witness, or some disinterested person, and subscribed by the witness. [51 v. 57, § 346; S. & C. 1042.]

§ 5276. **Depositions to be sealed, indorsed, and forwarded to clerk.** The deposition so taken shall be sealed in an envelope, indorsed with the title of the cause, and the name of the officer before whom it was taken, and such officer shall address and transmit the same to the clerk of the court where the action or proceeding is pending; and it shall remain under seal until opened by the clerk, by order of the court, or at the request of a party to the action or proceeding, or his attorney. [51 v. 57, § 347; S. & C. 1042.]

And where they were properly sealed up and indorsed, the fact that they were inclosed in another envelope addressed to the clerk, but without other indorsement, is not objectionable, 82 O. S. 163.

§ 5277. **Before what courts depositions may be used.** Depositions taken pursuant to this chapter shall be admitted in evidence on the trial of any civil action or proceeding pending before a justice of the peace, or mayor or other judicial officer of a municipal corporation, or before arbitrators, a referee, or a master; and such depositions shall be sealed up, indorsed with the title of the action or proceeding, the name of the officer before whom taken, and addressed and transmitted by such officer to such justice, mayor, or other judicial officer, arbitrators, referee, or master. [51 v. 57, § 348; S. & C. 1043.]

Justices of the peace, § 6544.

§ 5278. **When deposition may be used in other cases.** A deposition may be read in any stage of the action or proceeding, or in any other action or proceeding upon the same matter between the same parties, subject, however, to such exceptions as may be taken thereto under the provisions of this chapter. [51 v. 57, § 349; S. & C. 1043.]

Formerly it could not, 19 O. 142, 460. As a general rule, depositions read in evidence should be sent to the jury on their retirement, 1 C. S. C. R. 105; 2 O. S. 588. But where part of a deposition which could not be separated from the balance, contained incompetent evidence which was ruled out, it was held that the court might, in the exercise of its discretion, refuse to send it to the jury, 2 O. S. 588; see 8 Rec. 364; 40 O. S. 345; 8 C. C. R. 500. Refusal to allow it reversible error, 4 C. C. 84.

§ 5279. **Certificate of authentication.** Depositions taken pursuant to this chapter, by a judicial or other officer herein authorized to take depositions, having a seal of office, whether resident in this state or elsewhere, shall be admitted in evidence upon the certificate and signature of such officer, under the seal of the court of which he is an officer, or his official seal, and no other or further act of authentication shall be required; if the officer before whom the same is taken has no official seal, the depositions, if not taken in this state, shall be certified and signed by such officer, and shall be further authenticated, either by parol proof adduced in court, or by the certificate and seal of the secretary or other officer of state who is the custodian of the great seal of the state, or the certificate and official seal of the clerk or prothonotary of any court of the state where taken, attesting that such officer was, at the time of taking the same, authorized, within the meaning of this chapter, to take the same; but if the deposition is taken within this state by an officer not having a seal, or within or without this state under a special commission, it shall be sufficiently authenticated by the official signature of the officer or commission before whom it is taken; and when a deposition is not certified according to law, the fact neglected to be certified may be shown by parol proof. [51 v. 57, § 350; 57 v. 41, § 1; S. & C. 1043, 1171.]

§ 5280. **Certificate of officer.** The officer before whom the deposition is taken shall annex thereto a certificate showing the following facts:

1. That the witness was first sworn to testify the truth, the whole truth, and nothing but the truth.
2. That the deposition was reduced to writing by some proper person, naming him.
3. That the deposition was written and subscribed in the presence of the officer certifying thereto.
4. That the deposition was taken at the time and place specified in the notice.

But if the deposition be taken out of the state, by an officer authorized to take the same, the certificate may be in the foregoing form, or in the form authorized by the laws of the place where taken; and in the latter case the certificate shall be deemed, *prima facie*, as made in accordance with the laws of the place where made. [51 v. 57, § 351; S. & C. 1043.]

The certificate must show affirmatively that the requisitions of the section have been complied with, and a presumption that the officer did what the law prescribes is insufficient, 1 H. 95.

1. The certificate must state that the witness was "*first*" duly sworn, 6 O. S. 497, to testify the truth, etc., 1 H. 42, the "*whole truth*," W. 380; but the omission of the word "*first*" in the certificate is not objectionable if it appears in the commencement of the deposition, 1 H. 400.

2. W. 746.

3. See 1 H. 42.

§ 5281. **When depositions may be read.** When a deposition is offered to be read in evidence, it must appear, to the satisfaction of the court, that for a cause specified in § 5265, the attendance of the witness can not be procured. [51 v. 57, § 352; S. & C. 1044.]

§ 5282. **When depositions to be filed.** Every deposition intended to be read in evidence on the trial must be filed at least one day before the day of trial. [51 v. 57, § 353; S. & C. 1044.]

But the objection may be waived by proceeding to trial without filing exceptions, 2 W. L. M. 388.

§ 5283. **Fees for taking depositions.** The following fees shall be allowed for taking depositions in this state, viz.: Swearing each witness, four cents; for each subpoena, attachment, or order of commitment, fifty cents; for each hundred words contained in the deposition and certificate, ten cents; and the officer may retain the deposition until such fees are paid; the officer shall also tax the costs of the sheriff or other officer who serves the process aforesaid, and fees of the witnesses; and he may, if directed by a person entitled thereto, retain such depositions until his fees are paid. [51 v. 57, § 354; S. & C. 1044.]

See 9 Bull 103.

§ 5284. **Exceptions to depositions.** Exceptions to depositions shall be in writing, shall specify the grounds of objection, and shall be filed with the papers in the cause. [51 v. 57, § 355; S. & C. 1044.]

20 O. 127; 2 O. S. 322.

§ 5285. **Must be filed before trial.** No exception other than for incompetency or irrelevancy shall be regarded, unless made and filed before the commencement of the trial. [51 v. 57, § 356; S. & C. 1044.]

See § 5273n. Exception that the party's name was omitted in the notice, 9 Bull 156; 89 O. S. 100, 105; that the word "sworn" was omitted in the certificate of the notary, 2 O. S. 322; that new parties made after the taking of a deposition had no notice under § 5273, must be made before trial, 41 O. S. 368. And an objection that a question is a leading one should be made at the time it is propounded or before trial, 3 O. S. 406. The judgment will not be reversed for alleged error in overruling exceptions to depositions, unless it appear by bill of exceptions or otherwise that the facts upon which the exceptions are predicated exist. The allegation in the exceptions is not itself sufficient, 16 O. S. 1.

§ 5286. **Court to decide exceptions before trial.** The court shall, on motion of either party, hear and decide questions arising on exceptions to depositions before the commencement of the trial. [51 v. 57, § 357; S. & C. 1045.]

§ 5287. **When objections waived.** Errors of the court in its decisions upon exceptions to depositions are waived unless excepted to. [51 v. 57, § 358; S. & C. 1045.]

SUBDIVISION IV. ADMISSION AND INSPECTION OF DOCUMENTS.

§ 5288. **Party may be required to admit a paper to be genuine or pay expenses of proof.** Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper or document material to the action, and request an admission in writing of its genuineness; and if the adverse party, or his attorney, fail to give the admission in writing within four days after the request, and if the party exhibiting the paper or document be afterward put to any cost or expense to prove its genuineness, and the same be finally proved or admitted on the trial, such cost and expense, to be ascertained at the trial, shall be paid by the party refusing to make the admission, unless it appear, to the satisfaction of the court, that there were good reasons for the refusal. [51 v. 57, § 359; S. & C. 1045.]

§ 5289. **Party may be compelled to produce books and writings.** The court in which an action is pending may, on motion, and on reasonable notice thereof, require the parties to produce books and writings in their possession

which contain evidence pertinent to the issue, and under circumstances where they might have been compelled to produce the same by ordinary rules of proceeding in chancery; if the aff fail to comply with such order to produce books or writings, the court may, on motion, give judgment for the defendant as in case of non-suit; and if a defendant fail to comply with such order to produce books or writings, the court, on motion, may give judgment against him by default. [54 v. 23, § 360.]

The section does not authorize compulsory production before notary, 3 Bull 673; 7 Rec. 189; see § 5252rr.

Notice must, as a general rule, be given before trial, 20 O. 132; but when, from the nature of the action, defendant has notice, formal notice is not essential as a foundation for the introduction of parol testimony as to the contents of the instrument, 38 O. S. 122. Where defendant denies possession of a paper by affidavit, the court can not decide on affidavits the question of fact thus presented and render judgment as by default, 17 O. S. 76. Sufficiency of evidence to sustain motion for inspection of books, see 2 C. S. C. R. 76. See generally as to the introduction of parol evidence, when the instrument is in the possession of defendant, T. 48; 1 C. S. C. R. 292, and not produced after notice, 5 W. L. J. 8.

§ 5290. Party entitled to inspection and copy of books and documents. Either party, or his attorney, may also demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper, or document in his possession, or under his control, containing evidence relating to the merits of the action or defense, which demand shall be in writing, and shall specify the book, paper, or document with sufficient particularity to enable the other party to distinguish it; if compliance with the demand within four days be refused, the court or judge may, on motion, and notice to the adverse party, order the adverse party to give the other, within the time specified, an inspection and copy, or permission to take a copy of such book, paper, or document; and on failure to comply with such order, the court may exclude the paper or document from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party, by affidavit, alleges it to be; but this section shall not be construed to prevent a party from compelling another to produce any book, paper, or document when he is examined as a witness. [54 v. 23, § 360; S. & C. 1045.]

§ 5291. When court may appoint master to inspect

books, papers, etc. If the party in possession of any such book, paper, writing, or document, allege that the same, or any part thereof, is of mere private interest, or of such character that it ought not to be produced, or an inspection or copy thereof allowed or taken, the court may, on motion of either party, direct a private examination thereof by a master; if the master find that such book, paper, writing, or document contains matter pertinent to the case, and proper to be produced, inspected, or copied, he shall report the same to the court, or a copy of such part as he finds pertinent to the case, and proper to be produced, inspected, or copied; and the book, paper, writing, or document, or part thereof, so reported, shall be admitted in evidence on the trial, unless excluded by the court for proper cause. [54 v. 23, § 360; S. & C. 1045.]

§ 5292. How copies of written instrument obtained. Either party, or his attorney, shall, if required, deliver to the other party, or his attorney, a copy of any instrument of writing whereon the action or defense is founded, or which he intends to offer in evidence at the trial; and if the plaintiff or defendant refuse to furnish the copy required, the party so refusing shall not be permitted to give in evidence at the trial the original, of which a copy has been refused; but this section shall not apply to a paper, a copy of which is filed with a pleading, as provided in § 5085. [51 v. 57, § 361; S. & C. 1046.]

When the suit is on an account which is attached as an exhibit to the petition, and the exhibit is perhaps imperfect in the description of the goods or merchandise, the moneys paid or the duty performed, the remedy is to demand a bill of particulars under this section, 2 D. 499.

§ 5293. Action for discovery. When a person claiming to have a cause of action, or a defense to an action commenced against him, is unable, without a discovery of the fact from the adverse party, to file his petition or answer, such person may bring his action for discovery, setting forth in his petition the necessity of such discovery, and the grounds thereof, and such interrogatories relating to the subject matter of the discovery as may be necessary to procure the discovery sought, which, if not demurred to, shall be fully and directly answered, under oath, by the defendant; and, upon the final disposition of the action, the costs thereof shall be

taxed in such manner as the court deems equitable. [54 v. 23, § 3; S. & C. 1151.]

Under the code a discovery can not be asked for in the petition. To enable the plaintiff to find out the character and extent of his actual cause of action, he must state facts in his petition to show a cause of action against the defendants. 1 D. 156. Suits for discovery before code obsolete, 45 O. S. 356; Executor or administrator has benefit of discovery, 44 O. S. 596, 603.

SUBDIVISION V. VARIANCE.

§ 5294. When variance deemed material. Amendment. No variance between the allegation in a pleading, and the proof, shall be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits (1), and when it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled (2); and thereupon the court may order the pleading to be amended, upon such terms as are just (3). [51 v. 57, § 131; S. & C. 987.]

1. 30 O. S. 92. To constitute a variance between the allegations and the proofs, the difference must be as to the substantial elements of the case, and not as to the legal conclusions from the facts drawn by the pleader, 27 O. S. 159. 2. 41 O. S. 69; 11 N. Y. 368; 6 Oreg. 156; 68 Mo. 626; 79 Mo. 275. 3. 34 How. Pr. 467; 35 Barb. 298; 50 Barb. 95; and, when not objected to, disregarded after judgment, 15 O. S. 211; 35 O. S. 367. It is too late on error to make the objection, 24 O. S. 598; see 31 O. S. 399.

§ 5295. Variance not material. Amendment without costs. When the variance is not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment without costs. [51 v. 57, § 132; S. & C. 989.]

Immaterial variances. Account. Where an item of an account on which suit is brought is not proved on the trial to the full extent claimed in the petition, but the variance between the allegations and the proof is not such as to mislead the defendant (in regard to the nature and character of the claim, such variance will not prevent a recovery, if the facts proved show a good cause of action, 30 O. S. 92.

Consideration. An averment of a cash consideration, in hand paid, and proof that the consideration was a sight draft, which was paid, amendable variance, 5 Wall. 689.

Contract. A variance between the allegations and proof as to such provisions of a contract as are not essential to a recovery is not such a variance as to defeat the plaintiff's action, 28 O. S. 418; an allegation that plaintiff refused to enter into a contract unless one of the defendants should indorse such contract and

become responsible for its performance, and proof that said defendant should join in and sign the same, 4 Hun 561; petition on a *quantum meruit* and proof showing special contract and fixing price, 1 Hun 75. Where a verbal contract, as proved, was made at a different date from that alleged in the petition, amendment, before judgment, to conform to the proof is proper, 6 Bull 338. If the plaintiff had a cause of action for the breach of the contract proved, it would be no objection to his right to recover that all the terms of the contract, as alleged in the petition, were not sustained by the testimony. This is a mere question of variance, 36 O. S. 189. Averment of an express agreement, evidence of an implied one, 49 Barb. 398.

Dates. A variance as to dates will not, in general, be regarded as material, unless they are of the gist of the action, 4 Wall. 642; 10 How. Pr. 297.

Description. A variance in matters of description must be such as to mislead the adverse party to be material, 28 N. Y. 515. Where the petition describes a bill of exchange as payable to the order of A, and the bill offered in evidence is payable to B, an amendment was allowed, 7 Cal. 135. Where an instrument in writing was described in the petition as a contract to pay one hundred dollars, and the contract given in evidence was an agreement to pay one dollar, the petition was considered as amended in the higher court, 42 Ind. 103. Where the petition alleged that a draft was signed John Q. Jackson, and the proof showed that it was signed John Q. Jackson, agent, the variance was held to be immaterial, 28 Cal. 263. Where letters were declared on, in substance, as showing a contract, a literal variance between one of them as presented in evidence and as set forth in the pleading, is not sufficient to exclude it, 55 Ga. 164. Where the petition described a promissory note, upon which the action was founded, as payable "three months after date," and that produced on the trial was payable four months after date, the variance was held to be immaterial, 4 Duer. 448; but where a note declared on did not mention any place of payment, and that offered in evidence was made payable at a certain bank, the variance was held to be fatal, 73 Mo. 327. Where time is not descriptive of the date of an instrument, proof that it was made at a different time is not a fatal variance, 12 O. 300; and under the code, where the petition showed an agreement for extension of time from April 7th until next spring, and the proof that the agreement was for an extension of time for one year, it was held that this was not such a variance as would defeat the action, 38 O. S. 534, 537.

Estoppel. An estoppel must be specially pleaded to authorize evidence to establish it, 6 Oreg. 231, and in an action declaring on a written contract, it was held that evidence of facts showing an estoppel to deny such contract amounted to a failure of proof, 37 Ia. 229.

Fraud. An allegation of false and fraudulent assertions and proof of an implied warranty, though no fraud is shown, not fatally variant, 56 Barb. 59.

Joint Contract. Allegations of a joint contract made by several defendants, and proof that only part of them contracted, will not, under § 5311, be regarded as a material variance, 10 O. S. 451; 33 O. S. 395; but if the plaintiff alleges a joint undertaking of the plaintiff and another, and proves only a separate un-

dertaking by the plaintiff alone, this is a failure of proof, 13 O. S. 72; 17 O. S. 183, 323; see 21 Bull. 295.

Misnomer. A mere misnomer will be regarded as immaterial, 7 Abb. Fr. 134.

Negligence. Where the petition averred negligence in moving a car under which plaintiff was working, without notice or warning, and the proof showed that the negligence in not giving notice or warning was attributable to the foreman under whose control plaintiff was working, this was held a case of variance, and not one of failure of proof, 36 O. S. 221. An allegation of neglecting to forward goods, and proof of a refusal to deliver at their destination, not fatal, 36 How. Pr. 138; and an averment of wrongfully setting fire to a building, and proof of negligent fire, 25 N. Y. 252, 259.

Nuisance. See 15 O. S. 211.

Physician-Malpractice. Averment in an action against one as a physician, proof that he held himself out as a "cancer doctor," a mere variance, 29 O. S. 577; but an averment of an agreement to attend a patient and of an agreement to effect a cure were held fatal, W. 351. A declaration alleging a promise to effect a cure can only be sustained by an express promise, 7 O. (Pt. 2) 123.

Place. Allegation that a boat was wrecked at a certain place on a dam, and proof that it was wrecked in crossing over the dam, not fatal, 5 O. 410.

Sale. Allegation of a sale in writing, and proof of an oral sale, 30 Cal. 360; cf. 2 O. S. 131; an allegation that defendant had purchased certain goods, and proof that the purchase had been made for the defendant by another, as his agent, 60 Ia. 180.

Services. Allegation of an agreed compensation for services, and proof of the value of the services, 55 N. Y. 319; allegation of services in making a sale, and proof of services in trying to make a sale, 30 O. S. 96; allegation that defendant owes the plaintiff for labor and services "in procuring a loan," and proof that the money was obtained ready to be loaned, but that defendant, by his negligence, prevented the completion of the loan, 56 Wis. 456.

Slander. Charging plaintiff, in an action of slander, with sleeping with a man not her husband, and proving that such person was in bed with her, not a failure of proof, 36 O. S. 107.

§ 5296. **Failure of proof not a variance.** When the allegation of the claim or defense, to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof. [51 v. 57, § 133; S. & C. 989.]

A failure of proof is where no cause of action or defense whatever has been proved, 9 Daly 391. In case of failure of proof if the testimony is objected to by the adverse party, it must be excluded, whether he would be misled or not, 10 O. S. 621; 21 O. S. 668; but it has been held that the objection must be distinctly taken at the trial or it is not available, 7 Abb. n. s. 258; 263 cf. 22 O. S. 338.

Account. In an action on an account for work and labor, the plaintiff can not recover on proof of facts showing a guaranty by the defendant that other parties would pay for the work, 35 Ia. 80. If the action is brought on an account stated, and the proof fails to show such an account, though it may indicate a liability on a special contract, or for fraud, it is a case of failure of proof, 12 Jones & S. 424; 81 N. Y. 268.

Bond. Declaration averring existence of bond, and making profert, not sustained by proof of lost bond, 19 O. 360 (before code).

Contract. Allegation of an ordinary contract is not supported by proof of a special contract, 2 O. S. 131 (before code); an averment of work and labor on defendant's mill-dam, and proof that the work and labor were performed in the defendant's harvest field, a fatal variance, 21 O. S. 668. In an action on a contract there can not be a recovery for a tort, 2 Hun 466, and *vice versa* 50 N. Y. 1.

Estoppel. § 5295n.

Fraud. Where the petition charges the defendant with fraud in obtaining goods and converting them to his own use, and the proof shows the defendant to be a *bona fide* purchaser from one in possession without title, the case is one of failure of proof, 22 O. S. 388. Where fraud is alleged, a recovery can not be had for breach of contract, 50 N. Y. 1; but it has been held that if, by striking out the words sounding in tort, a complete statement of a cause of action on contract is made, and the defendant is not misled, an amendment may be allowed, 12 N. Y. Week. Dig. 528.

Joint and several liability. § 5295n.

Negligence. Where the petition alleges neglect of a railroad to construct cattle-guards, a recovery can not be had for neglect to build fences, 16 Barb. 315. Where the action is for damages for an alleged defect in the construction of an engine, plaintiff can not recover for an injury resulting from a defect in the track, 64 Mo. 249; 71 Id. 514.

Nuisance. In a petition stating facts constituting a nuisance of one kind, it is not permissible to prove a nuisance of a character essentially different, 18 Minn. 176; and an averment of a fence across the road is not supported by evidence of a fence near the road, 10 O. S. 621; averment in a declaration that plaintiff was entitled to the use of a "public alley," is not supported by a proof of a right to use a private alley, 4 O. 543.

Performance. Under a plea of performance, a *waiver* can not be proved, 37 O. S. 49; if the waiver is relied on, it must be specially pleaded, 5 Neb. 50.

Real property. Ejectment. In an action for the recovery of real estate, of which the legal title is in plaintiff, a defense grounded on an equitable title must be pleaded. The case is one of failure of proof, 36 O. S. 358, 361.

Miscellaneous. In an action against an officer for default in executing process, the petition described the process as having been issued on a judgment recovered jointly against two defendants. In proof it appeared that only one of the defendants had been served with process, such judgment was held a fatal variance, 29 O. S. 617. A court of common pleas has no appellate jurisdiction over a cause of action, which had never been submitted to or passed upon by the justice. The variance is such, that the petition may on motion be stricken from the

files, 30 O. S. 365. Where there is not a failure of proof but a variance, the court determines whether it will grant leave to amend or not. If leave is granted, the trial proceeds, unless a continuance becomes necessary by reason of the amendment, 36 O. S. 112. An averment in a petition that defendant by his agent negligently put up and sold a poisonous drug instead of a harmless medicine called for, is sufficient to authorize proof that such drug was not labeled "poison" as required by statute, 45 O. S. 471.

CHAPTER IV.

EXCEPTIONS.

§ 5297. What is an exception. An exception is an objection taken to a decision of the court upon a matter of law. [51 v. 57, § 290; S. & C. 1028.]

See notes to §§ 5190, 6707.

§ 5298. When exception must be made. The party objecting to the decision must except at the time the decision is made, and time may be given to reduce the exception to writing, but not more than fifty days beyond the date of the overruling of the motion for a new trial, or from such decision by the court when a motion for a new trial is not necessary. [89 v. 124; 87 v. 206; 84 v. 69; 51 v. 57, § 291; S. & C. 1028.]

Must except at the time decision is made. And the bill must show that the exception is taken. See 19 O. 300; 10 O. S. 223; 12 O. S. 1; 22 O. S. 324; 24 O. S. 554, 564; 2 C. C. 53; 6 C. C. 631. Error of law must be excepted to at the trial term as the law stood in 1874, 32 O. S. 258; but exceptions to the overruling a motion for a new trial could be taken when the order was made, 5 O. S. 51; though the ground of the motion was error of the court on the trial not excepted to at the time, Id.

Time to reduce exceptions to writing. By the Revised Statutes of 1880, "not beyond the term;" by the act of March 11, 1887 (84 v. 69), "not more than thirty days beyond the term at which the verdict of the jury is rendered, or the cause is decided when tried to the court;" by the act of April 15, 1890 (87 v. 206), "not more than forty days beyond the term, etc."

§ 5299. Form of stating exception. No particular form of exception is required; and the exception must be stated with the facts, or so much of the evidence, as is necessary to explain it, and no more, and the whole as briefly as possible. [51 v. 57, § 292; S. & C. 1028.]

Want of formality will not vitiate, 28 O. S. 561; no particular form of exception required, Id.

§ 5300. How taken when facts appear of record. When the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted at the end of the entry that he excepts. [51 v. 57, § 293; S. & C. 1029.]

A journal entry is not a substitute for a bill of exceptions, 31 O. S. 431; 44 O. S. 525, 530; 2 C. C. 152, 155. Where parties have consented to an entry showing that the bill was duly perfected they are estopped from showing it was untrue, 31 O. S. 103. Where the court makes a special finding of facts, and a party notes his exception, no bill of exceptions is necessary, 35 O. S. 113.

§ 5301. When bill of exceptions must be presented for allowance — Absence, sickness, death, expiration of term or other disability of trial judge or judges—Pending cases. When the decision is not entered on the record, or the grounds of the objection do not sufficiently appear in the entry, or the exception is to the decision of the court on a motion to direct a non-suit, or to arrest the testimony from the jury, (1.) or for a new trial for misdirection by the court to the jury, (2.) or because the verdict, or if a jury is waived, the finding of the court is against the law and the evidence, (3.) or on the admission or rejection of evidence, the party excepting must reduce his exceptions to writing and present the same to the trial judge or judges for allowance within fifty days after the overruling of the motion for a new trial,¹ or the decision of the court where a motion for a new trial is not necessary; provided, that in case the trial judge or judges be absent from the district or circuit when such bill of exceptions is so prepared for allowance, then the same may be deposited within said fifty days with the clerk of the court for the examination and allowance by such trial judge or judges, who shall be required to sign the same, if correct, on or before the fifth day of the term of the court next ensuing after the expiration of said fifty days; and provided further, that in case the trial judge of any district is sick and unable to attend to such signing, or in case of the death of such trial judge, or expiration of term of office or other disability, then such bill of exceptions so prepared for allowance may be presented to any judge of such district, and upon examination of the same

¹35 Bull 226.

and being satisfied that the same is correct, shall sign the same on or before the expiration of said fifty days. This provision shall be held to apply to cases pending, and to cases pending for the allowance of a bill of exceptions upon the passage of this act. [91 v. 141.]

1. 17 O. 439; 24 O. S. 83 (act 1858); 38 O. S. 389; 1 C. C. 9.
2. See 10 O. S. 223; 25 O. S. 584; 29 O. S. 448. 3. Before the passage of the act of 1858 the fact that the verdict was against the weight of the evidence was not ground of reversal, 6 O. S. 497. Error will lie to the overruling of the court upon questions of law where the case is submitted to the court in the same manner as if it had been submitted to the jury, 12 O. 482; 15 O. 58; 17 O. 123, 131; 14 O. S. 372. When a jury is waived, and issues of fact are submitted to the court with a request to have conclusions of fact found separately from conclusions of law, a question as to the sufficiency of evidence upon which findings of fact were made by the court can only be raised by bill of exceptions, 30 O. S. 92.

Previous acts. By the Revised Statutes of 1880, the bill of exceptions was required to be presented "to the court," for allowance within the term at which the verdict was rendered or decision made.

By the act of March 11, 1887 (84 v. 69), "to the trial judge or judges within thirty days from the end of the term at which the verdict is rendered or the finding of the court is made."

By the act of April 11, 1888 (85 v. 181), provision was made for depositing the bill with the clerk of court in the absence of the judge or judges who were required to sign "and seal" it, "on or before the first day of the next ensuing term of court."

By the act of April 15, 1890 (87 v. 206), it must be presented for allowance to the trial judge or judges "within forty days after the end of the term at which the verdict is rendered or the finding of the court is made, or where a motion for a new trial is made, and not decided by the court, at the same term of court, at which the verdict is rendered or the decision made, within forty days from the end of the term at which such motion is decided;" and there was the same provision as to depositing the bill with the clerk of court in the absence of the trial judge as in the previous act.

By the act of March 22, 1892 (89 v. 125), the bill must be presented for allowance "within fifty days after the overruling of the motion for a new trial, or the decision of the court where a motion for a new trial is not necessary," and provision was made for depositing it with the clerk of court within the fifty days for examination and allowance by the trial judge or judges who were required "to sign the same, if correct, on or before the fifth day of the term of the court next ensuing after the expiration of said fifty days."

The last act was passed and took effect April 13, 1894.

Component parts of, etc. Affidavits form no part of the record unless made so by bill of exceptions, 23 O. S. 192, and when copied in the record without a bill of exceptions can not be considered, *Id.*; 21 O. S. 82; 32 O. S. 276.

Agreed statement of facts form no part of the record unless made so by bill of exceptions, 16 O. 170; see 18 O. 122, and can not be made to supply the bill, 23 O. S. 577. If on an agreed

statement of facts the record shows that the parties agreed that the facts should be taken as admitted, and the judgment entered thereon according to their legal rights, such an agreed statement may be properly regarded as a special verdict and will be deemed part of the record upon error, 16 O. S. 282. Where there was a motion for a new trial made on the ground that the finding and judgment of the court were not supported by the law and the evidence, which was overruled and all the testimony offered before the trial court was in an agreed statement of facts in writing carried into the record and found by the court to be all the testimony offered by the parties on the trial, it was held unnecessary on overruling the motion to re-embody the same in a bill of exceptions, 27 O. S. 252.

Alterations. Altered stricken from the files, 4 C. C. 524; 10 Bull 294. Corrected, see § 5302*nn*.

Certificate of clerk can not be made to supply bill of exceptions, 6 O. S. 15; 23 O. S. 577.

Charge of court as well as evidence considered when contained in the bill, 32 O. S. 328, 494. When entered on the journal it is not a substitute for the bill, 31 O. S. 431, 536; 33 O. S. 444; 44 O. S. 530. Judgment will not be reversed because erroneous instructions were given to the jury unless the record discloses some evidence tending to show the instructions were material, 4 O. S. 251. The bill must set forth the charge of the court excepted to, 16 O. S. 344; 2 C. C. 152; and when the exception is to only part of the charge, the entire charge need not be set out, 38 O. S. 534. A general exception to a charge given to the jury "and to every part of it," without specifying or indicating the grounds of the exception, will not be regarded by a reviewing court, 30 O. S. 418. Exceptions taken to a general charge are not regarded on error unless the part objected to or the ground of objection is pointed out at the time, 25 O. S. 584; 33 O. S. 429. 31 O. S. 219, 224. Special exceptions to charge not in all cases necessary, 40 O. S. 52.

Deposition. Giving the substance of a *deposition* is insufficient, 30 O. S. 104. Judgment will not be overruled for alleged error in overruling exceptions to depositions, unless it appear by bill of exceptions or otherwise that the fact upon which the exceptions are predicated exist, 16 O. S. 1. Attaching, 34 Bull 259.

Evidence. Where the ground of reversal is that the verdict is not sustained by the evidence, it must affirmatively appear from the record that the bill of exceptions contains all the evidence, 4 O. S. 156; 1 C. C. 16; 19 O. 426; 2 O. S. 319, 593; 18 O. S. 477; 30 O. S. 104; and though the bill alleges that it contains all the evidence, if it appears from it that material evidence referred to therein was omitted, judgment will not be reversed on the ground that the verdict is against the evidence, 33 O. S. 77. The bill must set out all the evidence relating to a motion for a non-suit, 17 O. 439; but see 3 C. C. 36; and all the evidence relating to an alleged erroneous finding, 16 O. S. 328, and the evidence on exception to ruling on motion for a new trial, 22 O. S. 516; 17 O. 498. Evidence constituting part of the legal record need not be set out (written examination in probate court in proceeding by administrator against one suspected of having embezzled the effects of the estate), 19 O. S. 556; but the evidence rejected must be set out, 33 O. S. 444; 1 O. S. 253; its materiality must be shown, 5 O. S. 325, and it must be shown what it was proposed to prove by the question rejected, 33 O. S.

425, 444; 19 O. S. 573; but it is sufficient to state the facts which such testimony tended to prove, 22 O. S. 451; and "where a witness is rejected for incompetency to testify in a case, the court not having required the party producing the witness to state what he expected to prove by him, the bill of exceptions need not set forth what the witness would prove or was expected to prove in order to show that the party producing the witness had been prejudiced," 9 O. S. 1, 9; see 80 O. S. 472; but it is best to state the substance of what the party offered to prove, and claimed he could prove, by such witness, *Yaple's Pr.*, etc. 533; 17 O. 495; and necessary to do so when the ruling relates to the competency of the evidence and not of the witness, 9 O. S. 1; 11 O. S. 114; 2 O. S. 569, 574. Where evidence excepted to is improperly admitted, and all the evidence is not set forth in the bill of exceptions, nor all the facts which the evidence tended to prove, judgment should be reversed, 20 O. S. 517; 1 O. S. 141. Where a bill of exceptions merely states that there was evidence "tending to prove certain facts," the court can not infer that the evidence tended to prove any other fact, 2 C. S. C. R. 251; and when the statement in the bill of exceptions was that testimony was introduced tending to show, etc., this was held insufficient to advise the court whether the verdict was manifestly against the evidence so as to entitle the aggrieved party to a new trial, 2 O. S. 593. When the question was whether the court erred in finding that plaintiff had no authority to make the contract sued on, and the bill only set forth the evidence tending to prove the authority, and did not show whether there was or was not evidence tending to disprove it, it was held no ground of reversal was shown, 18 O. S. 419. The evidence set forth in a bill of exceptions will not be examined for the purpose of determining whether it is against the weight of the evidence where there was no motion for a new trial, 19 O. 296; 14 O. S. 276, 372; 26 O. S. 389; but such motion is not necessary when the error relied on is not of that character, 12 O. S. 621. An admission made during the jury trial, not incorporated into the pleading is only a part of the evidence and has no place in the record except in a bill of exceptions, 40 O. S. 113. Bill of evidence is not a bill of exceptions, 23 Bull 374.

Exhibits sufficiently identified if referred to and marked, though not actually attached to bill, 2 C. S. C. R. 37. An exhibit referred to as containing the evidence is not available to show rulings of the court, 23 O. S. 167, 168.

Facts. The bill must set out all the facts proven, 16 O. S. 60. The court can only look at the facts stated in the bill, 20 O. 34; 7 O. (pt. 1) 212. Allegations of fact made in a motion for a new trial not supported by the record nor made part thereof by bill of exceptions can not be considered upon proceedings in error, 30 O. S. 575. Where the court makes a special finding of facts and a party notes his exception, no bill of exceptions is necessary, 35 O. S. 113.

Jury. Objection that the jury was not properly sworn is of no avail where the bill nor record shows the form of oath, 28 O. S. 669. Objection that counsel was not permitted to read to the jury from a scientific work will not be regarded unless it appears from the bill that the passage was relevant or came within the legitimate scope of argument, 1 O. S. 286.

Non-suit. See Evidence *supra*, 8 C. C. 36.

Papers must be set out or attached to bill, or in some way

connected therewith so as to make them a part thereof, 1 O. S. 386; 12 Bull. 68; and so described as to leave no doubt of their identity, 1 O. S. 409; but where such papers are used without objection in the circuit court, and the defendant in error afterwards prosecutes a petition in error in the supreme court, he can not there object that they are no part of the bill, 7 O. S. 23. Before a paper purporting to be a bill of exceptions can be regarded by a reviewing court upon error as part of the record, it must appear from the record, outside of such paper, that a bill of exceptions was in due time tendered to and allowed, etc., by the court and made part of the record and the paper in question must be identified with reasonable certainty as the bill of exceptions which was thus made part of the record, 27 O. S. 597. Copies not sufficient where signatures are in question, 4 C. C. 160. Papers must be attached to bill, 10 C. C. 411.

Record. Must not contradict, 1 C. C. 28; 49 O. S. 297; 10 C. C. 509. Bill need not recite matters shown by 2 C. C. 158.

Miscellaneous. Exceptions relating to testimony contained in voluminous bill of exceptions will not be considered unless marginal references are made as provided by Rule I, C. C.; 7 C. C. 185. Adjournment of court, etc., 47 O. S. 318.

§ 5302. Time of allowance; signing, filing, and record.

If the exception be not true, then, after it is corrected, the trial judge, or a majority of the judges composing the trial court must allow and sign it before the case proceeds; or if the party excepting consents within fifty days after the overruling of the motion for a new trial, or the decision of the court when a motion for a new trial is not necessary; or in case of the absence of the trial judge or judges from the district or circuit, on or before the fifth day of the next ensuing term of the court, in accordance with the provisions of § 5301; the bill of exceptions shall be filed with the pleadings, and, if the party filing the same request it, made a part of the records, but not spread upon the journal; and an entry of the allowance and signing of the same must be entered upon the journal of the court within the time fixed for such allowance and signing. Provided, that where exceptions are not allowed and signed during the progress of the trial, the party excepting shall submit the bill of exceptions to the opposite counsel for examination not less than ten days before the expiration of said fifty days; and unless the trial judge or judges shall be absent from the district or circuit as provided in § 5301, the same shall be submitted to him or them for his or their signature, not less than five days before the expiration of said fifty days. Provided further, that the

trial judge or judges may at his or their discretion extend the time for signing such bill of exceptions for a period not exceeding ten days beyond the expiration of said fifty days; which extension must be indorsed on the bill of exceptions by said trial judge or judges. [80 v. 125; 87 v. 206; 85 v. 181; 73 v. 140; 51 v. 57, § 294; S. & C. 1029, 1155.]

Previous acts. By the Revised Statutes of 1880, the bill should be allowed and signed; the party consenting, within thirty days after the term; and if signed after the term the journal must be kept open and the allowance and signing thereof entered thereon as of the term.

By the act of April 11, 1888 (85 v. 181), provision was made for the absence of the trial judge, in which case it should be allowed and signed "on or before the first day of the next ensuing term."

By the act of April 15, 1890 (87 v. 206), the time was extended to forty days after the term for allowance and signing and provision was made for submission to opposite counsel of the bill for examination, and an extension of time for signing the bill in the discretion of the trial judge beyond the forty days.

Correction of. 20 O. 119. The reviewing court can not amend the record, 27 O. S. 44.

Allowance and signing. The bill must be signed, 43 O. S. 63, by the trial judge, 4 C. C. 345; but see § 5301; or a majority of the judges comprising the trial court, W. 73. Though the record does not show they were present at the trial, it will be presumed that they allowed and signed it in the discharge of their duty, 28 O. S. 554; but when signed by only one of the three judges composing the court, it will be disregarded, though the journal entry recites that it is allowed and signed, 44 O. S. 59; see 43 O. S. 63. Signing by two judges was held sufficient under Swan's statutes 676 when the court was equally divided, 18 O. 266. Presenting the bill at the trial term is not sufficient, 13 O. S. 271. Formerly it was required to be sealed, 35 O. S. 482. Signing is not an allowance, 6 C. C. 213. By the "party" who may consent to the extension is meant the party who accepts, 43 O. S. 23. Mandamus is the proper remedy to compel its allowance, 43 O. S. 16. The application for a mandamus should be accompanied by the bill, 22 O. S. 207. Where the answer shows that defendant is willing to sign a true bill, and denies that the bill presented is a true one, the writ will be refused, Id., 4 O. 351, but where an alternative writ commands a judge of an inferior court to allow and sign a certain bill of exceptions filed with the petition in the case and averred to be true and which was tendered to him in due time, or to show cause why he does not sign the same, and he fails to answer or answers and fails to show a sufficient cause, the peremptory writ should command him to sign the particular bill named, 43 O. S. 16; McIlvaine C. J. and Okey J. dissented. The power of determining whether the bill is true is vested with the judicial officer to whom it is presented, 4 C. C. 246; see 6 C. C. 219. The date of allowance should be shown by the bill, 8 O. 117. Record conclusive as to date of judgment, 34 Bull 236.

After overruling a motion for a new trial, etc. Formerly the allowance, etc., was required to be made at the trial term, 32

O. S. 415, or thirty days thereafter, 5 Bull 852; 9 Rec. 482; and where the bill was taken after the trial term on the overruling of a motion for a new trial, the judgment would not be reversed for errors occurring at the trial unless it appeared from the whole record that the verdict was contrary to the law or evidence, 32 O. S. 258, 415; 29 O. S. 448. And as the law stood in 1886, a bill of exceptions not taken at the trial term or within thirty-days thereafter, but taken on overruling a motion for a new trial continued to a subsequent term, could not be regarded as part of the record for the review of alleged errors occurring at the trial in the admission or rejection of evidence, or in the charge of the court or refusal to charge as requested, 46 O. S. 524. Under act, 85 v. 181; 47 O. S. 110; 5 C. C. 578. Under act, 87 v. 206, 6 C. C. 625. Must be filed fifty days beyond date of overruling motion for new trial, unless time is extended, etc., 33 Bull 350. Can not be restricted to less than that period, 34 Bull 166, 265. Submission to opposite counsel, 8 C. C. 407; 9 Id. 400, 421; 35 Bull 203; 51 O. S. 116. Submission to trial judge, waiver, 8 C. C. 407. Where during the trial of a civil action exceptions are taken to the ruling of the court in respect to its charge to the jury, and such ruling is afterward embodied in a motion for a new trial, which is overruled, the time within which a bill of exceptions may be taken setting forth such action of the court, should be computed from the date when the motion for a new trial was overruled, 35 Bull 226. A bill taken and filed more than fifty days after motion for new trial has been overruled and final judgment rendered on verdict, can not be regarded in circuit court, 9 C. C. 227.

Filing. The record is conclusive as to the time of filing, 6 O. S. 12. An omission to file the bill with the clerk will not invalidate it; when duly perfected and ordered to be made part of the record it is in law to be regarded as part of the record whether it comes into the possession of the clerk during the term or not, 31 O. S. 103; 10 C. C. 511.

Journal—Record, etc. The allowance and execution must appear in the journal, 26 O. S. 643; 27 O. S. 597; 40 O. S. 112, 113; 6 C. C. 211; and formerly of the term at which the case was tried and terminated, 36 O. S. 614; 12 Bull 286; but the necessary entry might be supplied by a *nunc pro tunc* order, 37 O. S. 147; 40 O. S. 110, 111; 50 O. S. 361; 33 Bull 207; 10 C. C. 502. The statute formerly provided that if the bill was to be signed after the term the journal must be kept open and the allowance and signing entered as of the term, 6 C. C. 211, 214. This is not now required under the present statute; and was not under the acts of 1887 and 1888, 8 C. C. 394. When due allowance, signing and filing within time are shown by the record and bill, parol evidence is not admissible to show that the bill was not presented to the opposite counsel ten days before the expiration of the forty days or to the judges five days prior thereto, 49 O. S. 297. While the record shows an allowance of the bill, this is conclusive while such record stands. It would seem to be good practice for the court allowing such bill to have the journal entry show that the provisions of the statute as to submission of the bill to opposing counsel for examination have been complied with or waived, 6 C. C. 219. These provisions seem to be mandatory and it would appear that the trial court would be justified in refusing to sign the bill or granting an application to have the entry of an allowance stricken out if they were not complied with or waived. Id., see 2 N. P. 106.

Extension of time. When under the provisions of the statute (89 v. 124), the trial judge grants an extension of time for signing a bill of exceptions, such extension is for every purpose that may be necessary to perfect said bill, 7 C. C. 159. Extension for convenience of judge, etc., 51 O. S. 116.

§ 5303. *Immaterial exceptions.* No exception shall be regarded unless it is material and prejudicial to the substantial rights of the party excepting. [51 v. 57, § 295; S. & C. 1029.]

Prejudice must be shown, 21 O. S. 536, 546; 33 O. S. 444; 15 O. S. 511; 11 O. S. 114; 2 O. S. 570. A bill of exceptions can not be taken before arbitrators, 42 O. S. 543; nor in an agreed case under § 5207, 22 O. S. 149; nor under §§ 95, 96 and 97, relating to fugitives from justice, 34 O. S. 316. The provisions providing for exceptions have no application to final judgments or orders, 26 O. S. 372; 12 O. S. 402.

§ 5304. *Withdrawing exceptions.* Exceptions taken to the decision of a court of record may, by leave of such court, be withdrawn from the files by the party taking the same, at any time before proceedings in error are commenced, and before the exceptions are recorded. [51 v. 57, § 296; S. & C. 1030.]

CHAPTER V.

NEW TRIAL.

§ 5305. *Causes for which a new trial will be granted.* A new trial is a re-examination, in the same court, of an issue of fact, after a verdict by a jury, a report of a referee or master, or a decision by the court; and the former verdict, report, or decision, shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes affecting materially the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, referee, master, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial.

2. Misconduct of the jury or prevailing party.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Excessive damages, appearing to have been given under the influence of passion or prejudice.

5. Error in the assessment of the amount of recovery, whether too large, or too small, when the action is upon a contract, or for the injury or detention of property

6. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law.

7. Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered, and produced at the trial.

8. Error of law occurring at the trial, and excepted to by the party making the application. [51 v. 57, § 297; S. & C. 1030.]

1. *Irregularities, etc.* It has been held not good ground for a new trial that papers not in the case were permitted to be taken by the jury in their retirement, where no prejudice could have resulted therefrom, 11 Bull 166; where a paper containing a computation of interest went to the jury, with other papers in the case, when it did not appear by whom it was given, and where no fraudulent intent was shown, 2 O. S. 431; because computations of an engineer were allowed to be given to the jury in a proceeding to appropriate private property, 32 O. S. 215; because the judge presiding at the trial of a prisoner for murder sent to the jury on their request, in the absence of the prisoner, a copy of the statutes calling their attention to the sections relating to homicide, 11 O. S. 114; because the bailiff went to the jury room after the retirement of the jury, where it was not shown that the jury were influenced by his presence, 4 Bull 576, 578. "It is unnecessary to determine whether the act of the sheriff and his deputy, who had testified in the cause on behalf of the state, in remaining in the room where the jury were deliberating, affords of itself ground of reversal, but we all unite in condemning such acts," 36 O. S. 195, 200, 201. Comments of an attorney in the case have been held not good ground, 3 Bull 431; 6 Bull 752; 18 O. S. 366, or that an attorney concealed facts from a witness, 39 O. S. 37. Communications with jurors by the court after the case has been submitted to them, and while they have it under consideration, except in open court, furnish ground for a new trial, 1 Pick. 242; 13 Johns. 487. Misconduct of witnesses for state, 15 Bull 238. Where the court permitted counsel for one of the parties in argument to the jury to read and comment upon matter not in evidence nor relevant to the issue and which was prejudicial to the opposite party, this was held an irregularity justifying a new trial, 36 O. S. 201. The taking of a judgment upon a warrant of attorney, without filing the original warrant or a copy thereof, is an irregularity, 9 O. S. 506.

2. *Misconduct of jury.* It has been held good ground for a new trial that jurors conversed on the subject of the case, while in their room, with persons on the street, 2 O. S. 54; (the rule is that such conversations as have a tendency to influence the verdict are sufficient to authorize the granting of a new trial, 11 Bull 278, citing 41 Conn. 269; 62 Me. 302; 36 N. J. L. 24; but where they have no relevancy to the case or consist of statements made by the jurors themselves, they will not have this effect, 11 Bull 278, citing 3 Neb. 357; 26 Ark. 323; 13 Conn. 445); because a juror asked favors of plaintiff during the trial, 5 Bull 29; because jurors in a criminal case, without the knowledge of the court or prisoner, obtained part of the charge of the court as printed in a newspaper and used it in their deliberations, 2 O. S. 54; because one juror personated another in a criminal

case, 34 O. S. 228. Uttered opinions, about matters on trial outside of court implying a strong disposition for or against one side or the other, 25 Bull 117; disclosed facts to fellow-jurors within his own knowledge contradicting important testimony, 42 O. S. 426; because the jury read deposition rejected by the court, 1 D. 21; made experiments by imitating signature during trial of action on note where defense was forgery, 2 Clev. R. 164; because a juror expressed his opinion before the trial of a criminal case, 19 O. 198, but not where evidence of the fact was conflicting, 23 O. S. 146, or not supported by affidavit that the fact was unknown, 4 O. S. 234; because the jury altered their verdict after it was sealed, 8 O. 405; because a juror separated from his fellows after final submission of a criminal case, and before verdict, and drank intoxicating liquors, 22 O. S. 486. Expressing opinion, see 9 C. C. 591.

It has been held not good ground for a new trial that jurors separated in a civil case after having agreed on their verdict, 3 O. 53; sealed verdict, 8 O. 405; where the separation was induced by an alarm of fire in the vicinity, 33 O. S. 77; 29 Bull 260; because a juror drank intoxicating liquor during an adjournment, unless there was reason to suspect it may have had some influence on the final result, 32 O. S. 328; because a juror was asleep while one of the witnesses was testifying and one of the attorneys making his argument, the court's attention not being called to the fact, 12 Neb. 5; because of improper and officious interference by the officer having the jury in charge, unless it led to misbehavior on the part of the jury, 10 O. 459; see 36 O. S. 195, 200; 4 Bull 576; because a juror viewed the premises alone, 2 C. S. C. R. 132; said, during the progress of the case, that his opinion was formed, 12 Bull 182; 27 Bull 56; expressed a hypothetical opinion before trial in a criminal case as to guilt or innocence of accused, 10 O. S. 599; inquired of an attorney, not in the case, how he was to get along without certain papers, and was told to do the best he could, that he, the attorney, could give him no advice, and that the juror could send up and have the court advise them, 33 O. S. 77; that a witness called by the jury repeated his testimony in the jury-room, T. 274. Affidavits of jurors are not admissible to impeach their verdict, 10 O. 459; 30 Bull 119, unless other testimony is first given, 2 O. S. 54; 42 O. S. 426; 7 C. C. 140. Affidavits stating that they misunderstood the charge will not be received on motion to set aside the verdict, 8 O. S. 384. Affidavit of attorney in case as to statements of jurors to him not such evidence *aliunde* as to make affidavits of jurors themselves as to the same facts admissible, 7 C. C. 140; treating jurors, 8 C. C. 244.

Misconduct of prevailing party. Any attempt on the part of prevailing party, or his attorney in the case, to corrupt a juror, though it is not shown to be successful, is a good ground for a new trial, 32 O. S. 328. Where it appears that, during the progress of a trial, the prevailing party, or his attorney, has furnished intoxicating liquors to a juror, it is a good ground for a new trial, unless it was clearly shown that it was not intended to influence his action in the case, and that it had no influence on his mind as a juror, *Id.*; see 5 Bull 875; 27 Bull 56, 59. When the prevailing party testifies on the trial in his own behalf, and, upon cross-examination, refuses to answer, and the trial proceeds, such refusal is misconduct for which the verdict should be set aside and a new trial granted, 4 W. L. M. 159; nonqualified juror retained, 4 O. S. 156.

3. *Accident. Surprise.* The submission of a case for trial by the attorney without notice to the client, is no ground for a new trial, though the client is thereby deprived of furnishing additional testimony, 1 D. 411. The surprise of a party arising from unexpected statements of a witness who had been twice before examined without disclosing facts to which he testifies, is not sufficient ground for a new trial when the verdict is justified by other evidence and substantial justice is done, 2 O. S. 588. A motion for a new trial on the ground that counsel were led by a misapprehension of the law to abstain from offering evidence pertinent to the issues made therein, is addressed to the sound discretion of the court, and its action thereon is not subject to review, 16 O. S. 88. See generally, 2 O. S. 164; 2 Bull 118; 5 Bull 353; 1 Clev. R. 178. Defendant in default because papers were taken out by plaintiff, 1 Clev. R. 194; not allowed for mistake of counsel 3 C. C. 623; 9 Bull 110; entering judgment in violation of agreement, 4 Bull 289.

4. *Excessive damages.* In actions for slander and libel, a new trial will not be granted unless the amount is so large as to show partiality, corruption, or improper influence of the jury, 13 O. 365; 14 O. 418. The party in whose favor an excessive amount is found may remit the excess, and a motion for a new trial on that ground will be overruled, 9 O. S. 72; 28 O. S. 175; 2 D. 463. The court may make a remittitur of the excess a condition of refusing to grant a new trial, 22 O. S. 446. A corporation, by the malicious misconduct of its servants or agents acting within the scope of their employment, may render itself liable to exemplary or punitive damages; but, this doctrine being capable of great practical abuse, the giving it in a charge to the jury in a case clearly not warranting its application, tends to mislead them; and where, in such a case, a verdict for damages is obviously exorbitant, it is error in the court to refuse to set it aside, and award a new trial, 19 O. S. 157; jury must abuse discretion, 21 O. S. 98.

5. *Error in assessment of amount of recovery.* Where in a suit for foreclosure of a mortgage an excessive amount is found due by reason of an erroneous method of calculating interest, and this is not discovered until after the term, a petition for a new trial lies under this section, 6 Bull 755.

6. *Verdict contrary to law, etc.* The verdict must be clearly against the evidence to warrant its being set aside, 6 O. 456; 4 O. S. 566; 12 O. S. 146; 5 O. S. 266; 35 O. S. 370; 18 O. S. 134; 35 O. S. 253. A mere difference of opinion between the court and jury is not a sufficient ground, 8 O. 507; 5 O. S. 266; 4 O. S. 566.

7. *Newly discovered evidence.* The newly discovered evidence must require a different verdict, 4 O. 5; 24 O. S. 133. It must not be cumulative, 11 O. 147; 10 O. S. 598; 1 D. 115; 15 O. 313. The evidence must be such as could not with reasonable diligence have been discovered and produced at the trial, 20 O. S. 150, 163. It is not a test that evidence is cumulative, that affidavits in support of it do not go to some new ground of defense, 2 C. S. C. R. 18. Evidence discovered after motion made is admissible, 35 O. S. 177. Error does not lie to overruling motion on this ground under S. & S. 1155; 26 O. S. 1; for gross abuse of discretion, 9 Bull 76, 26 O. S. 1. Motion must be made at trial term, 2 C. C. R. 541. Addressed largely to discretion of trial court, 11 C. C. 18.

8. *Error of law.* The exception must be made at the time the decision is rendered, 10 O. S. 223. A new trial will be granted

when competent evidence has been rejected which would conduce to prove the issue, 6 O. 87, 91; where from the whole record the court is of opinion that the direction of the judge, though in terms correct, might have been misunderstood by the jury, 12 O. S. 312; where improper evidence is admitted, and of such a character that it might have influenced the jury, 8 O. 81, 84. A new trial will not be granted because the court gave a wrong reason for rightly rejecting testimony, 4 O. 5; because improper evidence was admitted when it was merely cumulative, and when the jury must have found the facts as they did without it, 3 O. 107; because the court commented on the evidence in its charge to the jury, 6 O. 164; erred as to evidence which could not change the result, 6 O. 87, or in its charge as to the law, 1 O. 330, 349; 5 O. S. 375, 385. A new trial will not be granted on a technical ground, or to let in a technical defense, where substantial justice is done by the verdict, 1 O. 357; 5 O. 109. If the ground of the motion is, that improper testimony was admitted, such fact must be made distinctly to appear, 15 O. 735. See, generally, 40 O. S. 339; 2 C. C. R. 51.

§ 5306. For what causes new trial will not be granted. A new trial shall not be granted on account of the smallness of damages, in an action for an injury to the person or reputation, nor in any other action where the damages equal the actual pecuniary injury sustained. [51 v. 57, § 298; S. & C. 1032.]

See 1 H. 438.

§ 5307. When application for new trial to be made. The application for a new trial must be made at the term the verdict, report, or decision is rendered; and, except for the cause of newly discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered, and produced at the trial, shall be made within three days after the verdict or decision is rendered, unless such party is unavoidably prevented from filing the same within such time.

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The motion must be made within three days after the verdict, etc., 21 O. S. 637, or it is of no avail, 3 Neb. 446; 6 Neb. 532. When a party has filed a motion for a new trial, and afterwards withdraws it and prays the court to proceed to enter up judgment, he can not of right file a second motion, although the three days after the rendition of the judgment have not expired, 2 W. L. M. 554. A motion after verdict and before entry of judgment is sufficient compliance with statute, 5 O. S. 288. That the judgment was rendered near the close of the term, does not give to the losing party the right to file a motion for a new trial after the term has ended, although it was filed within three days after the rendition of the judgment and before it was actually entered on the journal, 3 C. C. 581. If the losing party files the motion after the term has closed, it will not justify the clerk in refusing to issue an execution on the judgment upon a proper

demand therefor, *Id.* When a motion for a new trial, for errors of law occurring at the trial, is continued to a subsequent term, the overruling of such motion is not assignable as error, unless such errors were excepted to at the time and the exceptions reduced to writing at the trial term, 2 C. C. 541, (1887). A motion for a new trial on the ground of newly discovered evidence must be made at the trial term. After such term, the application must be made under § 5309, *Id.* When not required, 10 C. C. 395.

§ 5308. How application for new trial made. The application must be made by motion, upon written grounds, filed at the time of making the motion; the causes enumerated in subdivisions two, three, and seven, of § 5305, must be sustained by affidavits or depositions, showing their truth, and may be controverted by affidavits or depositions, and for this purpose depositions may also be taken in the county where the action is pending. [77 v. 48; 51 v. 57, § 300; 76 v. 99, § 4; S. & C. 1033.]

The motion may be made by both parties, 28 O. S. 632. The grounds must be stated in the motion, 15 O. S. 211, 215.

§ 5309. Application for new trial after term. When the grounds for a new trial could not, with reasonable diligence, have been discovered before, but are discovered after, the term at which the verdict, report, or decision was rendered or made, the application may be made by petition, filed as in other cases, not later than the second term after the discovery; whereupon a summons shall issue; and be returnable and served, or publication made, as prescribed in § 5050; the facts stated in the petition shall be considered as denied without answer; if the service be complete in vacation, the case shall be heard and summarily decided at the ensuing term, and if in term, it shall be heard and decided after the expiration of twenty days from such service; and the case shall be placed on the trial docket, and the witnesses shall be examined in open court, or their depositions taken, as in other cases; but no such petition shall be filed more than one year after the final judgment was rendered. [51 v. 57, § 301; S. & C. 1033.]

See 35 O. S. 177. Allegations must be affirmatively stated, and not upon information, 7 Neb. 189; the petition is demurrable, *Id.* A mere allegation that the error was not discovered until after the term at which the judgment was rendered, where two terms have passed since then, is bad on demurrer, 6 Bull. 755.

Generally, 9 C. C. 405.

DIVISION IV. JUDGMENT.

CHAPTER I.

JUDGMENT IN GENERAL.

§ 5310. **Definition of judgment and order.** A judgment is the final determination of the rights of the parties in action; and a direction of a court or judge, made or entered in writing, and not included in a judgment, is an order. [51 v. 57, §§ 370, 509; S. & C. 1099.]

The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity notwithstanding it may recite that they did exist, 27 O. S. 600. Where a judgment is reversed for error and the cause is remanded for a new trial if the party against whom the reversal was had voluntarily submits to a new trial, he waives his right to prosecute a petition in error to reverse the judgment of reversal, 35 O. S. 218. The judgment of a court of competent jurisdiction, though erroneous, is binding until reversed, 6 O. S. 87; 9 O. S. 37; 11 O. S. 257; 17 O. S. 319; of a justice, 6 O. S. 302; of a foreign court, when defendant is served with process, 1 O. S. 259; 5 O. S. 545; 6 O. S. 43, and can not be collaterally impeached, 5 O. S. 522; 12 O. S. 253; 15 O. S. 447; 20 O. S. 344 (though service is had on only part of defendants, and judgment is against all, 16 O. S. 271; though service is by publication on residents, 16 O. S. 177), except in cases of fraud or mistake, 18 O. S. 225; 13 O. S. 446; 17 O. S. 242. The rule laid down in regard to impeaching judgments collaterally is this, that "the parties to an action can not impeach or set at naught the judgment in any collateral proceedings on the ground that it was obtained by fraud or collusion," 1 C. C. R. 212; but one not a party to such judgment has a right to collaterally impeach it whenever, in any case, it is attempted to be enforced against him or to prejudice his rights, *Id.*

Jurisdiction, etc. The jurisdiction of the courts of common pleas of our own state will be presumed where the record is silent upon the subject, 18 O. S. 535, and jurisdiction of the person will be presumed, though the fact may not affirmatively appear on the record, 20 O. S. 344. But the jurisdiction of the court rendering the judgment may always be inquired into when such judgment is made the foundation of the action, foreign or domestic, 33 O. S. 236, and the want of jurisdiction may be shown either as to the subject matter, the person, or in proceedings *in rem* as to the thing, 27 O. S. 600. Where it affirmatively appears in the record that the defendant was not served with process, or otherwise legally notified, the court has no jurisdiction, 1 O. S. 369, and want of jurisdiction renders a judgment void, 15 O. S. 435; *contra*, when court finds jurisdiction, 13 O. S. 446; 35 *Id.* 550; 39 *Id.* 366; 43 *Id.* 78. Order of court fixing value of widow's dower and directing sale of real estate subject thereto is a judgment, 4 C. C. 38. What is a judgment, see 17 Bull 276. Judgment in action to sell land to pay balance due on it, 33 O. S. 376. An order for sale of real estate to pay debts on petition which states facts sufficient to warrant such an order will not be reversed for

want of a journal entry, showing that the facts stated in the petition, were found to be true, 37 O. S. 532. It is competent for the heir by cross petition to attack such judgment on the ground of fraud, *Id.* A court of equity will not decree a judgment lien to be invalid on the ground of the want of legal notice to the defendant, where the plaintiff has not been guilty of misconduct and the defendant had actual knowledge of the pendency of the action, unless a meritorious defence to the action be shown, 37 O. S. 502. A judgment determines the rights of the parties according to the facts stated in the pleadings, and if after issue joined a change takes place in the rights of the parties, it must be shown by supplemental pleading, otherwise, it should be disregarded, 37 O. S. 282. A judgment is conclusive only as to facts without the proof or admission of which it could not have been rendered. Dismissal of petition for specific performance no bar to action for money paid on agreement, 36 O. S. 471. Conclusive effect, 34 Bull 268.

§ 5311. Judgment may be for or against one or more of several plaintiffs or defendants. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and by the judgment the court may determine the ultimate rights of the parties on either side, as between themselves, and grant to the defendant any affirmative relief to which he is entitled. [51 v. 57, § 371; S. & C. 1048.]

The common law rule that where a joint contract is the subject of an action, the recovery must be against all or neither of the defendants, has been modified by this section so as to authorize judgment to be rendered "for or against one or more of several defendants," where it turns out upon the trial that only one or more of several defendants in such joint action is liable, without subjecting the plaintiff to the necessity of bringing a new action against such defendant or defendants, 10 O. S. 451. Where a separate action might have been maintained, a separate judgment is proper, 26 O. S. 141; as against drawer and acceptor, *Id.*; maker and indorser, 2 Bull 18; and in ejectment against several who defend jointly, judgment may be rendered for or against one or more of them, 33 O. S. 395. The section "has no legitimate bearing on the right to commence a several suit upon a cause of action confessedly joint. It relates to the termination and not to the commencement of a suit, and before it can be applied, the testimony must show that the *real cause of action* was several and not joint," 14 O. S. 291. In an action on an alleged joint contract, judgment may be rendered against one or more of several defendants when it turns out upon the trial that only one or more of them is liable upon the contract, 27 O. S. 674. In an action by creditor to enforce statutory liability of stock holders, the judgments rendered and to be rendered being several, the court has full power to render judgment against one or more defendants leaving the action to proceed against the others, 44 O. S. 834.

§ 5312. Court may render judgment against one or more, leaving action to proceed against others. In an

action against several defendants, the court may render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper. [51 v. 57, § 371; S. & C. 1048.]

As against maker and indorser, 1 H. 77; 2 Bull 18; in an action against two defendants for money on an account, where it appears, a several judgment is proper, 33 O. S. 312; but where a joint suit against all the obligors or contractors is the only remedy, it is error for the court to render a several judgment against one or more of the defendants, leaving the action to proceed against the others, 23 O. S. 543; s. p. 1 C. C. R. 72. In an action against three defendants, where judgment is rendered against two, the third is not a necessary party in proceedings in error, 36 O. S. 460. In an action against two defendants on a joint note, judgment can not properly be taken against one defendant, leaving the action to proceed as to the other. But when the defendant against whom the judgment was taken did not complain of such error, the judgment against him stands, and no subsequent recovery can be had against the other defendant, the claim against both on the note being merged in the judgment, 1 C. C. 72.

§ 5313. Court may dismiss for want of prosecution. The court may dismiss the petition with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served. [51 v. 57, § 371; S. & C. 1048.]

§ 5314. When action may be dismissed without prejudice. An action may be dismissed without prejudice to a future action:

1. By the plaintiff, before the final submission of the case to the jury, or to the court, when the trial is by the court.

2. By the court, where the plaintiff fails to appear on the trial.

3. By the court, for the want of necessary parties.

4. By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence.

5. By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action.

6. By the plaintiff, in vacation, on payment of costs; and the clerk, in such case, shall forthwith make an entry thereof on the journal, whereupon the dismissal shall take effect; but this clause shall not apply to a petition in error, or a case in which a counter-claim or set-off has been filed.

In all other cases the decision must be upon the merits, upon the trial of the action. [51 v. 57, § 372; 59 v. 39; S. & C. 1049; S. & S. 601.]

1. Where a general demurrer to a petition is sustained, and leave to amend is given, but the plaintiff, instead of amending, discontinues the action, there is no judgment that bars another suit upon the same cause of action, 4 O. S. 566; but the submission of a case on demurrer to the answer, on the ground that it does not contain a defense, is a final submission of the case, within the meaning of this section, unless leave is obtained to reply or amend; and the plaintiff can not, if the demurrer is overruled, without leave of court, dismiss his action without prejudice, 24 O. S. 445. When a judgment is reversed and the cause remanded for further proceedings, and the plaintiff in the court below then voluntarily becomes non-suit, he is not estopped from bringing a new action, 15 O. S. 464; but plaintiff can not, in a proceeding for the contest of a will, defeat the contest by dismissing his petition where either of the defendants in his answer joins in the prayer that the will be set aside as invalid, 20 O. S. 208. Where the court, finding on the trial that the plaintiff had not proved his case, gave him until the next day to obtain more testimony to prevent being non-suited, and plaintiff failed to find more testimony, it was held not error to refuse to allow plaintiff to dismiss without prejudice on the next day, 9 Rec. 276, 377; 5 Bull 816; generally, 1 Bull 832.

3. See 38 O. S. 314, 318.

4. Dismissal of injunction without prejudice, 44 O. S. 221; see 35 Bull 164.

6. "But this clause shall not apply to a petition in error," 22 O. S. 206, "or a case in which a counter-claim or set-off has been filed," 14 O. S. 81; see 2 C. S. C. R. 258, 538; but where the allegations of an answer are not such as to entitle defendant to affirmative relief, such answer does not present a counter-claim, which the defendant has a right to have tried after the plaintiff's cause of action has been dismissed without prejudice, 30 O. S. 126. "In all other cases the decision must be upon the merits," etc. Where it appears that a dismissal was upon a hearing of the case, it is to be inferred that it was upon the merits, 4 O. S. 251; but where the record of a former suit was pleaded in bar, and the record of such former suit was silent as to whether the dismissal was upon the merits or for want of prosecution, it was held there was no presumption either way, and the consequence was that, as it must be established that the dismissal was upon the merits, there was no bar, *Id.* And where it did not appear that the case came within the grounds mentioned in this section, the court having rendered a judgment dismissing an action without prejudice, it was held such judgment of dismissal was an entirety, and though it might have been erroneously rendered, it would not constitute a bar to a subsequent action upon the same subject matter, 30 O. S. 378; see 23 O. S. 560; 44 O. S. 223. The court may, in a proper case, arrest the testimony from the jury and render judgment for defendant. The judgment in such case, however, has not the effect of a non-suit at common law, but is, under this section, an action upon the merits, 24 O. S. 83; but if there is evidence tending to support the issue, the court has no power to arrest the case from the jury and enter

a non-suit, 11 O. S. 362; 24 O. S. 83. It is only where no evidence is introduced by the plaintiff tending to support the issue, or where it is such as to show clearly that he has no cause of action, that it is the duty of the court to direct judgment of non-suit, 38 O. S. 389, 393. A judgment of a mayor's court dismissing an action without prejudice, on the ground that the testimony does not sustain the action, is unauthorized and erroneous, 31 O. S. 463 (under justice's code). By answer and trial defendant waives an order of dismissal, 10 O. S. 621. Under the former practice the action of the court in arresting the testimony from the jury and rendering judgment for defendant did not operate as a bar to a subsequent suit, being a non-suit, as at common law, 4 O. S. 399, 628; 11 O. 452; 19 O. 426; see under former practice, 11 O. 299; 12 O. 35; 14 O. 606; 18 O. 72. The dismissal of a bill to foreclose a mortgage was no bar to a suit on the note secured thereby, 10 O. 300. In District court to reverse an order granting a new trial made by the court before judgment was rendered, if dismissed, the error, if one, can not be used by plaintiff below, 9 O. S. 505. Where several defendants are sued as principals in an unlawful transaction, a dismissal of the suit as to part of the defendants without a finding of the issues as to them constitutes no ground upon which the remaining defendants against whom a verdict has been rendered, can ask a reversal of the judgment, 19 O. S. 55. Where former decree of dismissal is relied on as estoppel and it appears that such bill may have been dismissed for want of jurisdiction, such dismissal does not estop, 10 O. S. 45. Applies to C. C., 34 Bull 266.

§ 5315. When set-off or counter-claim is pleaded. If a set-off or counter-claim be pleaded, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff has dismissed his action, or fails to appear. [51 v. 57, § 373; S. & C. 1050.]

14 O. S. 81; see § 5314, subd. 6n.; 6 Bull 884.

§ 5316. Sale of mortgaged property. When a mortgage is foreclosed, a sale of the premises shall be ordered;¹ and when the premises to be sold are in one or more tracts, the court may direct the officer who makes the sale to subdivide, appraise, and sell the same in parcels, or to sell any one of the tracts as a whole. [67 v. 114, § 374; 76 v. 27, § 7.]

See § 5021. Parties in foreclosure, see §§ 5005, 5006, notes, mortgage. Pleadings, notes, §§ 5060, 5070. Jurisdiction over person and property necessary, 1 O. S. 369. As between successive purchasers in fee, and for full value of separate parcels of land incumbered by a prior mortgage on the whole, a sale of the same to satisfy the mortgage will be made in the inverse order of alienation, 42 O. S. 305; see 14 O. 365; 20 Bull 397. Purchase under proceedings foreclosing mortgage and selling mortgaged premises, takes the complete title of mortgagor and mortgagee 2 O. S. 339. Record showing that court on hearing cause "considered that the plaintiff ought to recover" a specified amount and ordered the sale of the premises shows no personal judg-

¹51 O. S. 250.

ment against defendant, 28 O. S. 644. Junior mortgagee may foreclose without having first paid off the prior mortgage, 30 O. S. 24. The plaintiff in a proceeding in foreclosure having more than one valid lien on the premises, will be protected only to the extent that he sets them up and asks relief, 31 O. S. 215. Title of purchaser where senior mortgagee forecloses without making junior mortgagee a party or giving him notice, 43 O. S. 437. Owner of junior mortgage may maintain an action against such purchaser to foreclose, *Id.* The enforcement of a mortgage on lands in one state given by residents of another and contrary to its laws, to secure notes executed in the latter and payable there is determined by the law of the place of the execution and performance of the contract, 3 C. C. 47. Where an action is commenced by a junior mortgagee to foreclose his own and a prior mortgage and the amount realized from the sale of the property is not sufficient to pay the first mortgage, such junior mortgagee is not entitled to an allowance for counsel fees out of the proceeds of such sale, even if the sale was made wholly at his instance and on his petition, 3 C. C. 12. In a suit to foreclose and to marshal liens, an order to sell can not be made subject to a certain undetermined indebtedness set forth in the answer and cross-petition of a defendant lien holder, 3 C. C. 144. In such an action the court should see that all lien holders and parties interested should be made parties and it is error to dismiss without prejudice a defendant lien holder and order a sale of the property subject to his undetermined lien, *Id.*

§ 5317. **Proceedings where mortgaged property is situated in more than one county.** When the mortgaged property is situated in more than one county, the court may order the sheriff, or master, of each to make sale of the property in his county, or may direct one officer to sell the whole; the court may direct that the property, when it consists of a single tract, be sold as one tract, or in separate parcels, and shall direct whether appraisers shall be selected for each county, or one set for all; and shall also direct whether publication of the sale shall be made in all the counties, or in one county only. [67 v. 114, § 374.]

§ 5318. **When judgment to operate as a conveyance.** When a party against whom a judgment for a conveyance, release, or acquittance is rendered, does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance, release, or acquittance had been executed conformably to such judgment. [51 v. 57, § 375; S. & C. 1051.]

The reversal of a decree divests the title, as between the parties, but not as to *bona fide* purchasers, 3 O. 337. Having acquired jurisdiction over the person of the defendant, the court may enforce its decree by attachment, whether the lands ordered to be conveyed lie within or without the state, 14 O. S. 302; 24 O. S.

474; see 4 O. 425. In order for decree of conveyance to operate on land, it must be within the jurisdiction of the court. If land is in foreign jurisdiction it operates only by attachment, 19 O. 222. A decree in the circuit court of the United States for the district of Ohio directing the conveyance of land, did not operate as such conveyance under the laws of Ohio, 7 O. (Pt. 1), 271.

§ 5319. **Judgment against married woman.** When a married woman sues, or is sued, like proceedings shall be had, and judgment rendered and enforced, as if she were unmarried, and her property and estate shall be liable for the judgment against her; but she shall be entitled to the benefits of all exemptions to heads of families. [81 v. 65; 71 v. 47, § 28.]

See § 4996. Before the last amendment this section read, "and her *separate* property shall be liable," etc.; see, under prior statutes, 36 O. S. 79; 43 O. S. 171. Prior to the legislation of 1884 (81 v. 65), a married woman did not possess legal capacity to enter into a co-partnership with her husband. *Quære* whether such power now exists, 44 O. S. 192. This legislation did not enlarge or vary the liabilities of a married woman, 46 O. S. 183. It does not affect causes of action, but relates solely to the remedy in suits against married women, 3 C. C. 592. A married woman having entered into a contract to become surety for her husband, no specific lien having been created by contract, the remedy is not by suit in equity to charge her separate estate, but by action at law against her as an unmarried woman, 30 Bull 24; 50 O. S. 417; Exemptions allowed, 52 O. S. 468.

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

§ 5320. **Assessment of damages upon default.** When all or a part of one or more of the causes of action are not put in issue by answer, judgment may be taken, as upon a default, for so much of the plaintiff's demand as is not put in issue by the answer, upon any or all the causes of action, without prejudice to the rights of the plaintiff as to that portion of his demand disputed;¹ and if, in the determination of any cause, the taking an account, proof of a fact, or the assessment of damages, is necessary, the court may take the account, hear the proof, or assess the damages, or may refer the case to a referee or master for such purpose, or direct the matter to be ascertained by a jury, as the case may require. [69 v. 44, § 376; 51 v. 57, § 598; 76 v. 78, § 1; S. & C. 1130.]

¹See 9 C. C. 8.

Where a party takes judgment by default for a less sum than the amount due on his claim, he can not maintain an action to recover the remainder, 20 O. S. 315. Judgment on default may be taken for the part of the account admitted, and the case continued as to the remainder, 26 O. S. 537; but the section applies only where a part of the cause or causes of action is admitted and part denied, 37 O. S. 363; see 1 C. C. R. 290; and where plaintiff sues to recover the value of services rendered, and defendant admits the rendition of the services, but denies the value to be as great as claimed, and avers it does not exceed a certain specified amount, it is error to render a judgment in plaintiff's favor for such amount, and continue the cause for trial to determine the further value of such services, *Id.* Where defendant admits the debt and pleads a set-off, judgment may be taken for the difference, 34 O. S. 294. Judgment by default can not be taken against an infant, 8 O. 377; 1 O. S. 544; 17 *Id.* 484; it can not be taken before a case is placed on the trial docket, 34 O. S. 123, before the expiration of the day named in the summons for answer, *Id.* Judgment by default without proof is erroneous in an action to rescind a contract and recover back purchase money, 1 *Clev. R.* 90; in an action for a demand not founded on contract, express or implied, where the averments of the petition are admitted by demurrer, 2 C. C. R. 143; but judgment by default without proof in an action on an account is not erroneous, 25 O. S. 635. Judgment by default may be taken after appearance, T. 45, at a subsequent term, on demurrer sustained to an answer at a previous term, 3 *Bull.* 894, 895. Default for answer may be set aside where a meritorious defense is shown on payment of costs by defendant, 1 *H.* 190; can not be set aside without leave, 2 *Bull.* 97; nor at subsequent term, 2 *H.* 178; but the opening of a default is discretionary with the court, 1 *Clev. R.* 341; 2 *Id.* 97. Special demurrer can not be pleaded after default, T. 183. On default, plaintiff may waive jury and have court assess damages, 2 *Clev. R.* 114, 299. Right to jury, 22 O. S. 372. In an action for unliquidated damages on a judgment by default, no more than a nominal sum, not affecting costs, can be awarded in the absence of proof of actual damages, 29 O. S. 362, 363. The Supreme Court, where it finds the issue raised by an answer to be immaterial, and not such as was tried in the court below may nevertheless, to prevent any injustice by treating the defendant as in default, consider the question of error, as if the defense on which the case was tried had actually been pleaded, 29 O. S. 13, 17.

CHAPTER III.

JUDGMENT BY CONFESSION.

§ 5321. Confession of judgment in person. A person indebted, or against whom a cause of action exists, may personally appear, in a court of competent jurisdiction, and, with the assent of the creditor, or person having such cause of action, confess judgment; whereupon judg-

ment shall be entered accordingly. [51 v. 57, § 377; S. & C. 1052.]

§ 5322. **Pleadings in such action.** The debt or cause of action shall be briefly stated in the judgment, or in a writing to be filed as pleadings in other actions. [51 v. 57, § 378; S. & C. 1053.]

§§ 5321, 5322 apply only to a proceeding wherein the debtor appears *personally* in court and confesses judgment, 35 O. S. 107.

§ 5323. **Enforcement of judgment. Release of errors.** Such judgment shall authorize the same proceedings for its enforcement as judgments rendered in actions regularly brought and prosecuted; and the confession shall operate as a release of errors. [51 v. 57, § 379; S. & C. 1053.]

§ 5324. **Warrant of attorney to be produced and filed.** An attorney who confesses judgment in any case shall, at the time of making such confession, produce the warrant of attorney for making the same to the court before which he makes the confession; and the original or a copy of the warrant shall be filed with the clerk of such court. [51 v. 57, § 380; S. & C. 1053.]

This section does not dispense with a petition or its verification; but where the warrant of attorney, under which a confession of judgment is made, authorizes the waiving of process, and the release of all errors, and the judgment is rendered upon a good cause of action stated in a petition not properly verified, the defect in the verification on a proceeding in error must be deemed to have been waived, 31 O. S. 435, 436. A warrant of attorney to confess judgment must be strictly construed, and the authority conferred can not be exercised beyond the limits expressed in the instrument, 19 O. S. 536; 11 Bull 51; 2 C. C. R. 43. A warrant of attorney to confess judgment does not authorize such confession before the maturity of the note, 33 O. S. 236. A warrant of attorney to confess judgment against a principal and surety authorizes judgment against principal alone, 3 O. S. 445. It seems that a warrant of attorney may authorize judgment in favor of any holder of the note, 25 O. S. 340, 346; and on a sealed note, payable to bearer, judgment may be confessed in favor of the holder, 35 O. S. 141; "but in all the reported cases the power is *expressly conferred* to confess a judgment in favor of the *legal holder* or the *holder*," 2 C. C. R. 43; 25 O. S. 346; 35 O. S. 141; 46 O. S. 433. It was queried whether such warrant could be used for taking judgment in favor of the indorsee of the note, 11 O. S. 503; see 19 O. 130; 19 O. S. 536; and held that it could not if the note was sealed, 19 O. S. 536. In 19 O. 130 it was held the warrant was not negotiable. That the warrant is not negotiable does not destroy the negotiability of the note, *Id.*; and the erasure of the power of attorney from the note does not invalidate the note, 8 O. S. 445. A warrant to confess judgment upon a debt due directly from the defendant to the plaintiff is not a collateral security merging the original debt, 18 O. 279. The taking of a judgment

upon a warrant of attorney without filing the original warrant, or a copy thereof, is an irregularity, for which the judgment may be set aside, 9 O. S. 505; see 1 C. C. 211; 11 O. 417; 46 O. S. 433; 8 C. C. 107.

§ 5325. **Warrant of attorney to confess judgment for person in custody.** A warrant of attorney executed by a person in custody, to confess judgment in favor of the person at whose suit he is in custody, shall be of no force unless executed in the presence of an attorney expressly named by the person in custody, and signed by him as witness. [51 v. 57, § 381; S. & C. 1053.]

CHAPTER IV.

MANNER OF GIVING AND ENTERING JUDGMENT.

§ 5326. **Judgment to be entered in conformity to verdict.** When a trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict, unless the verdict is special, or the court order the case to be reserved for future argument or consideration.

Judgment regular, though entered before expiration of time for filing motion for new trial, 34 Bull 166.

§ 5327. **Judgment on special verdict or case reserved.** When the verdict is special, or when there is a special finding on particular questions of fact, or when the case is reserved, the court shall order what judgment shall be entered. [51 v. 57, § 383; S. & C. 1054.]

§ 5328. **Judgment contrary to verdict.** When, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against such party. [51 v. 57, § 384; S. & C. 1054.]

Judgment *non obstante veredicto* can only be given for a plaintiff. The remedy for a defendant is to have the judgment arrested, 2 O. S. 287. Under the code judgment must be entered for the defendant, notwithstanding the verdict against him, if the plaintiff's petition does not set forth a good cause of action, 16 O. S. 129. Where the only issue is upon the truth of immaterial matter, it is not error to render judgment upon the pleadings irrespective of the verdict of the jury, 22 O. S. 247. On motion for judgment for defendant, notwithstanding the verdict on the pleadings, the court can only look at the pleadings, 40 O. S. 113. A legal cause of action substantially set forth, although so inartificially stated as to be bad, if specially objected to by demurrer, is sufficient after verdict, and a judgment rendered thereon is good, 7 O. S. 270, 274; see 19 Bull 270. 31 O.S. 649.

§ 5329. **When defendant may have judgment.** When a counter-claim or set-off, established at the trial, ex-

ceeds the plaintiff's claim so established, judgment for the defendant must be given for the excess; or, when it appears that the defendant is entitled to any affirmative relief, judgment shall be given therefor. [51 v. 57, § 385; S. & C. 1054.]

41 O. S. 403, 406; 22 O. S. 297.

§ 5330. **Rights of minors reserved.** It shall not be necessary to reserve in a judgment or order the right of a minor to show cause against it after attaining the age of majority; but in any case in which, but for this section, such reservation would have been proper, the minor may, within one year after arriving at the age of majority, show cause against such order or judgment. [83 v. 74; 51 v. 57, § 386; S. & C. 1054.]

See 45 O. S. 93; 17 O. S. 484.

§ 5331. **Judgments must be entered on journal.** All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action. [51 v. 57, § 387; S. & C. 1055.]

As an instrument of evidence, the journal is deemed one of the records of the court, 5 O. 435; 6 O. 34: see 38 O. S. 370; 42 O. S. 449.

§ 5332. **Record to be made unless waived.** The clerk shall make a complete record of every cause as soon as it is finally determined, unless such record, or some part thereof, be duly waived. [51 v. 57, § 388; S. & C. 1056.]

§ 5333. **When record to be made up and signed.** The clerk shall make up such record in each cause in the vacation next after the term at which the same was determined; and the presiding judge of the court shall, at the next term thereafter, subscribe the same. [51 v. 57, § 389; S. & C. 1056.]

Signature of presiding judge not essential to validity of record, 7 O. (Pt. 1) 212.

§ 5334. **What must go into the record.** The records shall be made up from the petition, the process, the return, pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court; but if items of an account, or copies of papers attached to the pleadings, are voluminous, the court may order the record to be made by abbreviating the same or inserting a pertinent description thereof, or

by omitting them entirely. The bill of exceptions shall be filed with the pleadings and papers, but not recorded, unless the court for good reasons shall so order; and evidence must not be recorded. [87 v. 236, 51 v. 57, § 390; S. & C. 1056.]

See 2 C. C. R. 152, 156; 7 O. (Pt. 1) 257, 258. What shall constitute the record of a case is regulated by statute, and any paper the statute authorizes to become part of the record may be made part thereof without an express order of the court to that effect, 27 O. S. 44. A reviewing court on error has no control of the records of the court below, and can not make any changes or corrections therein, *Id.* The orders, decrees, and minutes of the court of common pleas, in those cases in which no final record is made, or is required to be made, are legal evidence and matter of record, if the court was in the exercise of its legitimate power and authority, 6 O. 251, 253; but entries in dockets or calendars not required by law to be kept, and entries made by the judge on his docket, are not evidence of what they contain, but are the mere statements of the persons making them, 10 O. 198.

§ 5335. Courts to cause records to be completed. When the judicial acts or other proceedings of any court have not been regularly brought up and recorded by the clerk thereof, such court shall cause the same to be made up and recorded within such time as it may direct; and when they are made up, and, upon examination, found to be correct, the presiding judge shall subscribe the same. [51 v. 57, § 391; S. & C. 1057.]

§ 5336. Transcribing records. Fees of clerk. A court, when it deems it necessary, may, by order on the journal, direct its clerk to transcribe any book in his office into a new volume, and the transcript so made shall be as valid as the original; and for such services the clerk shall receive six cents for each hundred words copied, to be paid out of the county treasury. [36 v. 15, § 2; S. & C. 1281.]

§ 5337. When complete records need not be made. § 5332 shall not apply:

1. In criminal prosecutions, when the indictment has been quashed, or when the prosecuting attorney has entered a *nolle prosequi* on the indictment.

2. When the action has been dismissed without prejudice to a future action, as provided in § 5314.

3. In all actions in which, in open court, at the term at which the final order or judgment is made, both parties declare their agreement that no record shall be made. [51 v. 57, § 392; S. & C. 1057.]

§ 5338. When record made upon payment therefor. When an action has been dismissed without prejudice to a future action, the clerk shall make a complete record

of the proceedings, upon being paid therefor by the party requesting it. [51 v. 57, § 393; S. & C. 1057.]

§ 5339. **Index to judgments.** The clerk shall keep an index, direct and reverse, of all judgments, by names of parties alphabetically arranged, showing, in separate columns, the name of the judgment debtor, the name of the judgment creditor, the amount of the judgment, and the year and term when it was rendered, the page of the journal on which it is entered, the volume and page of the final record, the number of the suit, the number and the time of issue of the execution, and satisfaction thereof, when it appears to have been made. [34 v. 45, § 1; 36 v. 15, § 1; S. & C. 1280, 1281.]

See § 5424.

§ 5339a (1). **Court may order general index when none has been made. Fees of clerk.** In any county where a sufficient general index has not at any time heretofore been made, an index such as is required by said original section [§ 5339] may be made by the clerk, to be appointed by the court of common pleas of such county, if said court is of the opinion that the same is needed, and it orders the same to be made. Application for such order, specifying the period of time such index is designed to cover, may be made by the clerk of said court. The clerk making such index shall receive the same fees for making the same as is now provided by law for making indices to judgments to be paid out of the county treasury in the same manner as the fees specified in § 1261. [80 v. 216.]

§ 5339a (2). **How lost or destroyed record supplied or replaced.** Whenever the record required by law of the proceedings, judgment, or decree in any action, or other proceeding of any court in this state, in which a final judgment has been rendered, or any part thereof is lost, or destroyed by fire, riot, or civil commotion, such court may, upon the application of any party interested therein, grant an order authorizing such record, or part thereof, to be supplied or replaced:

1. By a certified copy of such original record, or part thereof, when the same can be obtained.

2. By a duly certified copy of the record in the supreme court of such original record of any action or proceeding that may have been removed to the supreme court, and remain recorded in said supreme court.

3. By the original pleadings, entries, papers, and files in such action or proceeding, when the same can be obtained.

4. By an agreement in writing, signed by all the parties to such action or proceeding, their representatives or attorneys, that a substituted copy of such original record is substantially correct. [81 v. 160.]

The act to supplement § 5339 is made applicable to justice's and mayor's courts, 83 v. 207. There is no appeal or proceeding in error from the order of any court in relation to the restoration of any lost or destroyed record, document, or other writing, 81 v. 165, 166, and the remedies and rules of evidence provided by the act are cumulative to those already provided by law, *Id.*

§ 5339b. *Id.* In cases not provided for by § 5339a. Whenever the record required by law, or any part thereof, of the proceedings, or judgment, or decree in any action, or other proceeding of any court in this state, in which the final judgment has been rendered, is lost, or destroyed by fire, riot, or civil commotion, and such loss can not be supplied or replaced as provided in § 5339a, any person or party interested therein may make a written application to the court to which said record belongs, setting forth the substance of the record so lost or destroyed, which application shall be verified in the manner provided for the verification of pleadings in a civil action, and thereupon summons shall issue, and actual service, or service by publication, shall be made upon all persons interested in or affected by said original judgment or final entry, in the manner provided by law for the commencement of civil actions, provided the parties may waive the issuing or service of summons and enter their appearance to such application; and upon the hearing of such application, without further pleadings, if the court finds that such record has been lost or destroyed, and that it is enabled by the evidence produced to find the substance or effect thereof material to the preservation of the rights of the parties thereto, it shall make an order allowing a record, which record shall recite the substance and effect of said lost or destroyed record or part thereof, and the same shall thereupon be recorded in said court, and shall have the same effect as the original record would have if the same had not been lost or destroyed, so far as it concerns the rights of the parties so making the application, or persons or

parties so served with summons or entering their appearance, or persons claiming under them by a title acquired subsequently to the filing of the application. [81 v. 160.]

§ 5339c. *Id.* Evidence to effect restoration. Upon the hearing of the application provided in § 5339b, the court may admit in evidence any complete or partial abstract of such record, docket entries, or indexes, and any other written evidence of the contents or effect of such records and published reports concerning such actions or proceedings, when the court is of opinion that such abstracts, writings, and publications were fairly and honestly made before the loss of such records occurred. [81 v. 161.]

§ 5339d. *Id.* Proceedings in error or appeal. Whenever a lost or destroyed judgment or order is one to which either party has a right to a proceeding in error or appeal, the time intervening between the filing of the application mentioned in section 5339b, and the final order of the court thereon, shall be excluded in computing the time within which a petition in error may be filed or appeal taken as provided by law. [81 v. 161.]

§ 5339e. *Costs of restoring lost records. Order for such restoration. Purchase of attested copies.* The costs to be taxed upon an application to restore a lost or destroyed record, shall be the same as provided for like services in civil actions. Where the record is lost, or destroyed by fire, riot, or civil commotion, or other cause, the cost of replacing and restoring the same, as provided in § 5339a, and § 5339b, shall be paid out of the county treasury, by order of the court. And in any case where the original papers and records have been saved from such destruction, riot, civil commotion, or other cause, and the appearance dockets have been destroyed, and in cases where such records saved should be re-copied, the court may order that the clerk of the courts restore such original papers upon the appearance docket, the recopying of the records, the replacing of the appearance docket, indexes thereto and such matters as the court may deem necessary, and the costs thereof shall be the same as are provided for like services in civil actions, and shall be paid out of the county treasury, by the order of court, to be paid into the fee fund as other fees. Whenever in counties containing cities of

the first grade of the first class the county commissioners and clerk of the courts, or a majority of them, shall be satisfied that any company, person or persons shall have true copies of any records, plats, or valuable abstracts of the same, which they may deem necessary to restore, such commissioners and clerk, or a majority of them, shall, and they are hereby authorized, to purchase any such records, valuable abstracts or copies thereof, as they may deem necessary or useful. Such purchase to be made at a valuation to be agreed upon with such company, person or persons having such records or abstracts, and said commissioners and clerk, or a majority of them, and in case of inability to agree, then at a valuation to be fixed by three arbitrators, or a majority of them, one to be chosen by said commissioners and clerk, or a majority of them, a second to be chosen by the company, person or persons having such records or abstracts, and the third to be chosen by the two so selected. Such books, records, or abstracts so purchased shall be deposited in the office of the clerk, or copies thereof shall be transcribed by the clerk, to the record books provided for that purpose in his office. Such record books shall be carefully compared with the original books of such company, person or persons having the same in such manner as the clerk may direct, and on the last page of such books the person or persons making such comparison shall make and subscribe an affidavit to the fact of such comparison having been made, and that such book contains true copies of the original records or valuable abstracts thereof. The said book shall be kept by the county clerk as other records in his office, and thereafter they, and properly certified transcripts therefrom, shall be *prima facie* evidence in all courts of the state of the truth of the matter therein set forth. The commissioners of any county so purchasing said records, abstracts or copies thereof as hereinbefore provided, are hereby authorized and directed for the purpose of defraying the expenses of said purchase, to issue the bonds of said county, to an amount not to exceed the amount of said purchase so made as aforesaid; said bonds to be in sums not less than one hundred dollars, nor more than one thousand dollars each, and bearing interest not to exceed five per cent, payable annually,

and to be sold for not less than their par value. [88 v. 157.]

Sections 2 and 3 of this act provide for the purchase of and copy of records of the probate court and records and plats required by law to be kept in the recorder's office.

Sec. 4. "Said county commissioners are hereby authorized to pay to said arbitrators provided for in section one of this act a reasonable compensation, not to exceed one hundred dollars each, for their services, and to add to the amount of bonds to be issued not to exceed the sum of ten thousand dollars to pay for such copying in said several offices as may be needed."

§§ 528a, b, c, provide for the restoration of the records of the probate court. §§ 907, 907a, b, c, d, relate to the restoration of records affecting real estate. §§ 4935a, b, c, of road records.

CHAPTER V.

JUDGMENT FOR COSTS, AND ITS ENFORCEMENT.

§ 5340 (1) When plaintiff must give security for costs; the surety and his obligation; cash deposit as to security: executors and administrators. The plaintiff, if a non-resident of the county in which the action is brought, or a partnership suing by its company name, or a corporation when insolvent, must furnish sufficient security for costs. The surety must be a resident of the county, and approved by the clerk and his obligation shall be complete by indorsing the summons, or signing his name on the petition as surety for costs; he shall be bound for the payment of the costs which may be adjudged against the plaintiff in the court in which the action is brought, or in any other court to which it may be carried, and for all costs which may be taxed against the plaintiff in such action, whether he obtain judgment or not; but the plaintiff may deposit with the clerk of the court such sum of money, as security for costs in the case, as, in the opinion of the clerk, will be sufficient for the purpose; and the court may, on motion of the defendant, and if satisfied that such deposit is not sufficient, require the same to be increased, from time to time, so as to secure all costs that may accrue in the cause, or personal security to be given; but nothing in this section shall be so construed as to require administrators or executors to give security for costs in any suit commenced or prosecuted by them in the county in

which they have been appointed or qualified, and in which they have given bond as such executor or administrator. [85 v. 306; 80 v. 11; 77 v. 71; 44 v. 66, §3; 64 v. 15, §543.]

This section was not expressly repealed by the following section.

§ 5340 (2). When plaintiff must give security for costs. The plaintiff, if a non-resident of the county in which the action is brought, or a partnership suing by its company name, must furnish sufficient security for the costs. The surety must be a resident of the county and approved by the clerk, and his obligation shall be complete by indorsing the summons, or signing his name on the petition as surety for costs; he shall be bound for the payment of all costs which may be adjudged against the plaintiff in the court in which the action is brought, or in any other court to which it may be carried, and for all costs which may be taxed against the plaintiff in such action, whether he obtained judgment or not. But the plaintiff may deposit with the clerk of the court such sum of money, as security for costs in the case, as, in the opinion of the clerk, will be sufficient for the purpose; and the clerk may, on motion of the defendant, and if satisfied that such deposit is not sufficient, require the same to be increased, or personal security to be given. Provided, that the provisions of this section shall not apply to re-enlisted veteran volunteers, who are seeking to avail themselves of the provisions of an act "to authorize and require the payment of bounties to veteran volunteers," passed April 16, 1867, and amended April 16, 1880. [86 v. 353.]

Security for costs must be demanded before the case is called for trial, T. 134. The want of security for costs can not be assigned as error, 2 O. 259; T. 133. A surety may become such by appearance and approval of court, 7 O. S. 309. His liability begins with the undertaking and ends with the termination of the action, 9 Rec. 58; 5 Bull 501. The writ may be indorsed for costs after return, so as to bind him, 18 O. 240. Under a previous amendment the surety of a non-resident for costs was only liable for such costs as the defendant might recover against the plaintiff and for the costs of the plaintiff's witnesses, 15 O. S. 478 (1864). There is no mode of release provided by the statute, and without consent of the defendant the surety can be saved from future liability only by dismissal of the action, 9 Rec. 58; 5 Bull 501. Moving for new security is not a waiver of the right to object to the discharge of the original surety unless such security is given, Id.

§ 5341. When action may be dismissed for want of security for costs. If security for costs be not given in a case mentioned in the preceding section, the court shall, at any time before the commencement of the trial, on motion of the defendant, and notice to the plaintiff, dismiss the action, unless in a reasonable time, which may be allowed by the court, security be given. [51 v. 57, § 544; S. & C. 1116.]

§ 5342. Security required, if plaintiff become non-resident. If the plaintiff become a non-resident of the county in which the suit is brought, during its pendency, he may be compelled, in the manner stated in the two preceding sections, to give such security. [51 v. 57, § 545; S. & C. 1116.]

§ 5343. When additional security may be required. In an action in which security for costs has been given, the defendant may, at any time before commencement of the trial, after reasonable notice to the plaintiff, move the court for additional security; and if, on such motion, the court is satisfied that the surety has removed from this state, or is not sufficient, the action may be dismissed, unless, in a reasonable time, to be fixed by the court, sufficient security be given. [51 v. 57, § 546; S. & C. 1116.]

§ 5344. When judgment may be entered against surety for costs. After final judgment in an action in which security for costs has been given, the court may, on motion of the defendant, or a person having a right to such costs, or any part thereof, after ten days' notice of such motion, render judgment, in the name of the defendant, or his legal representatives, against the surety for costs, his executors or administrators, for the amount of costs adjudged against the plaintiff, or so much thereof as is unpaid; and execution may be issued on such judgment as in other cases, for the use and benefit of the persons entitled to such costs. [51 v. 57, § 547; S. & C. 1116.]

§ 5345. When informers shall pay costs. If an informer, under a penal statute, to whom is given the penalty, or any part thereof, if recovered, dismiss his suit or prosecution, or fail in the same, he shall pay all costs, unless he is an officer whose duty it is to commence the same. [51 v. 57, § 548; S. & C. 1117.]

This section refers only to *civil* actions, Yapple's Pr., etc. 591.

§ 5346. Costs, when defendant disclaims. When a defendant disclaims having title or interest in land, or

other property, the subject of the action, he shall recover costs, unless, for special reasons, the court adjudge otherwise. [51 v. 57, § 549; S. & C. 1117.]

§ 5347. Costs on motions, amendments, etc. Unless otherwise provided by statute, the costs of motions, continuances, amendments, and the like, shall be taxed and paid as the court may direct. [51 v. 57, § 550; S. & C. 1117.]

§ 5348. When defendant shall pay costs. When it is not otherwise provided by statute, costs shall be allowed, of course, to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property. [51 v. 57, § 551; S. & C. 1117.]

Where the defendant pleads a counter-claim, which is allowed, and the plaintiff recovers one hundred dollars or more, he is entitled to judgment for costs, 40 O. S. 106, 107. In an action to recover the amount of a judgment theretofore rendered, the plaintiff is entitled to recover interest upon the costs adjudged to him from the date of the original judgment to the time of recovery, 42 O. S. 83, 93. The costs which are carried into the judgment of a party draw interest whether they have been paid by such party or not, Id. A court without jurisdiction has no power to render judgment for costs, 42 O. S. 249; but a court reversing a judgment for the reason that the court below had no jurisdiction must render judgment for costs on error, 42 O. S. 312, citing 22 O. S. 268; see, generally, 3 O. 380, 381; 5 O. 45, 47; 9 C. C. 431.

§ 5349. When plaintiff shall not recover costs. If it shall appear that a justice of the peace has jurisdiction of an action, and the same has been brought in any other court, and the judgment is less than one hundred dollars (1), unless the recovery be reduced below that sum by counter-claim or set-off (2), each party shall pay his own costs; and in all actions for libel, slander, malicious prosecution, assault, assault and battery, false imprisonment, criminal conversation, or seduction, actions for nuisance, or against a justice of the peace for misconduct in office, when the damage assessed is under five dollars, the plaintiff shall not recover costs (3). [83 v. 86; 51 v. 57, § 552; S. & C. 1117.]

1. 14 O. S. 336 (1863). The amount claimed in the petition determines the jurisdiction of the court of common pleas, 6 O. S. 598; but there can be no judgment for costs on appeal if the justice had no jurisdiction 15 O. 483. It is error to instruct a jury that in a proper case for exemplary damages they should know that in case the party recovers less than one hundred dollars he can not recover his costs in the action, 11 O. S. 457. 2. 6 O. S. 598 9 C. C. 431. And if plaintiff recovers one hundred dollars or more,

after the allowance of a counter-claim, he, of course, recovers costs, 40 O. S. 106, 107; but in an action brought in common pleas for the recovery of money only, where the facts alleged in a counter-claim set up by the defendant are denied by the plaintiff, and the jury by a general verdict find "the issues joined" for the plaintiff, and assess his damages at less than one hundred dollars, the plaintiff is not entitled to recover costs, 23 O. S. 196; see 8 Rec. 415. In case of offer to confess judgment in full of all claims included in petition if jury find for plaintiff a sum greater than the amount of offer and interest plaintiff will not be liable for defendant's costs though sum adjudged due him by court when reduced by set-off of defendant is less than amount named in offer, 49 O. S. 364. 3. Assault and battery, 3 O. 380; slander, W. 36.

The party recovering can not have included in his judgment the costs made by the adversary party, and when they are so included the judgment, as to such costs will be reversed on proceedings in error, 31 O. S. 293. Where a judgment is opened and on issue joined the amount of the judgment is reduced, and the plaintiff takes a second trial, which results in a finding in his favor of the same amount as on the former trial, it is not error to render judgment against him for the costs of the latter trial, 34 O. S. 142. The plaintiff in actions of trespass to real estate, in the common pleas court, does not recover costs where the recovery is for less than one hundred dollars, but the judgment should be that each party pay the costs by him made, 14 O. S. 336. Where a case is dismissed for want of jurisdiction of the subject matter the court can only strike the case from its docket, and can render no judgment for costs, 8 O. S. 205; 22 O. S. 268; 2 O. 254; 4 O. 200.

§ 5350. When plaintiff to pay costs. Costs shall be allowed, of course, to any defendant, upon a judgment in his favor in the actions mentioned in the two preceding sections. [51 v. 57, § 553; S. & C. 1117].

In a suit against a trustee in relation to the trust estate, demanding what he might hesitate to grant, except under the protection of the court, the plaintiff will be charged with the costs, 12 O. 287, 299.

§ 5351. When costs awarded in the discretion of the court. In other actions the court may award and tax costs, and apportion them between the parties, on the same or adverse sides, as it may adjudge to be right and equitable. [51 v. 57, § 554; S. & C. 1118.]

In proceedings to redeem mortgaged property, 18 O. S. 184; in action for partnership account, 1 C. S. C. R. 166; on exceptions to administrator's account, 16 O. S. 273; where judgment on warrant of attorney is set aside under § 5354, 34 O. S. 142, 150. In a suit by directors to dissolve an insolvent corporation where there was no property, the court in its discretion could award costs against the directors, 29 O. S. 438; see 21 Bull 288, 289; 7 C. C. 442.

§ 5352. When several actions are brought on the same instrument. When several actions are brought on one instrument in writing, against several parties who might

have been joined as defendants in the same action, no costs shall be recovered by the plaintiff in more than one of the actions, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within the state. [51 v. 57, § 555; S. & C. 1118.]

1 H. 286.

§ 5353. Fees on summons to another county. When a summons is issued to another county, it may be returned by mail, and the sheriff shall be entitled to the same fees as if it had issued in the county of which he is sheriff. [51 v. 57, § 556; S. & C. 1118.]

CHAPTER VI.

NEW TRIAL, AND OTHER RELIEF AFTER JUDGMENT.

§ 5354. When court may vacate or modify judgment or order after the term. The common pleas court, or the circuit court, may vacate or modify its own judgment or order, after the term at which the same was made:

1. By granting a new trial for the cause within the time and in the manner provided in § 5309.

2. By a new trial granted in proceedings against defendants constructively summoned, as provided in § 5048.

3. For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order.

4. For fraud practiced by the successful party in obtaining a judgment or order.

5. For erroneous proceedings against an infant, or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings.

6. For the death of one of the parties before the judgment in the action.

7. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending.

8. For errors in a judgment, shown by an infant within twelve months after arriving at full age, as prescribed in § 5330.

9. For taking judgments upon warrants of attorney for more than was due the plaintiff, when the defendant was not summoned, or otherwise legally notified of the time and place of taking such judgment.

10. When such judgment or order was obtained, in whole or in a material part, by false testimony on the part of the successful party, or any witness in his behalf, which ordinary prudence could not have anticipated or guarded against, and the guilty party has been convicted. [82 v. 34; 77 v. 46; 74 v. 115, § 534.] *

After the existence of one or more of the causes enumerated in this section has been found, an issue or issues as to the validity of the alleged defense should be made up by proper pleadings and tried as in other cases, 25 O. S. 340. When the alleged defense is thus adjudged to be valid, and not before, the court is authorized to make a final order of vacation or modification of the original judgment, *Id.* When the judgment sought to be vacated is taken jointly against all the defendants, and the defense set forth in the petition is joint, going to the whole cause of action, the judgment, if erroneous as to some of the defendants, is erroneous as to all, and if the defense is established should be vacated as to all, 24 O. S. 625. The provisions of this chapter apply to special proceedings, 6 O. S. 221. A judgment under this section is not appealable. It can only be reviewed on petition in error, 12 O. S. 169; but where a petition impeaching a decree for fraud seeks relief, which could not be obtained by a retrial of the case in which the judgment or decree was rendered, it will be regarded as a civil action, and not a proceeding under this section; and an appeal may be taken in such action as in other cases, 23 O. S. 415; generally, 3 C. C. R. 144. The causes enumerated in this section apply only to proceedings to vacate or modify judgment or order after the term at which it was entered, 25 Bull 28; apply to superior court, 30 Bull 369.

1, 2. §§ 5048, 5309.

3. *Mistake, neglect, etc., of clerk. Irregularity.* The court has power to direct the clerk to correct not only clerical errors, but such errors as may arise from any fraudulent or improper alteration or mutilation of its files or records, 8 O. S. 201. To make such correction, the court may hear evidence and act on the proof, and it is not essential to the action of the court that the judges act on their personal knowledge of the error, *Id.* A clerical error in the entry of a judgment may be corrected on motion at a subsequent term, 3 O. S. 508; and the court may, on motion made at a subsequent term, modify the entry of a verdict and judgment, so as to show that the judgment was in fact rendered on June 16th, though not recorded until the 19th, 18 O. S. 419. An omission to enter upon the journal notice of an appeal, it has been held, could not be cured by a *nunc pro tunc* order at a subsequent term, although when it was given notice of the appeal had been entered by the court upon its docket, 10 O. S. 198; but "so rigid a rule of construction would not seem to be applicable to laws remedial in their nature," 1 O. S. 175. And where a motion to confirm a sheriff's sale was granted and the sale confirmed, but by mistake the judge noted on the court docket that the motion was refused, and this note misled the clerk, and induced him to make a like entry on the journal of the court, it was held that this was a mistake of the clerk as well as the judge, which might, under this subdivision, be corrected, 43 O. S. 198. Parol evidence is admissible to show that a judgment was

entered by mistake, 34 O. S. 672. Where the judgment entered on the journal is different from what was intended by the court, but is shown to be such as ought to have been rendered, it will not be vacated or modified as entered by mistake, *Id.* An interlocutory decree could be modified, altered, or set aside on motion at any time before final decree, 13 O. 408. An order *nunc pro tunc* could not be entered at a subsequent term, unless an order was actually made at a preceding term and omitted to be entered, 1 O. 375; 3 O. 486, 553; 6 O. 83. Where an order *nunc pro tunc* was entered at the July term, to take effect at the April term preceding, an appeal bond filed within thirty days after the July term was not in time, 10 O. 202.

Irregularity in obtaining judgment or order. It is competent for the court, on motion and proof by affidavit, to order an entry of satisfaction of a judgment wrongfully made to be set aside and vacated and award execution on the judgment, 14 O. S. 464. A judgment may be set aside on motion at a subsequent term for irregularity or improper conduct in procuring it to be entered, 3 O. S. 445; 3 O. 15; and although the court, in the exercise of such power, may act erroneously, such error will not render the proceeding void so that the record can be collaterally impeached, 20 O. 344. In a proceeding of this kind, the court exercises an equitable jurisdiction, and should not vacate a judgment or order against the right and justice of the case, 3 O. S. 445. When no process is served on defendant and an attorney enters an appearance for him without authority, judgment against him may, on motion, be set aside at a subsequent term, 3 O. 519; see 19 O. 286. When judgment is taken on a warrant of attorney without filing the original warrant or a copy thereof, this is an irregularity for which the judgment may be set aside at the same or a subsequent term, the motion having been filed at the first term and regularly continued, 9 O. S. 506. And if such motion was made at the term when judgment was entered by one or more of several debtors, and continued to a subsequent term, it may be so amended at such subsequent term as to permit the other debtor or debtors to join in it, *Id.* To render judgment by default before the expiration of the day named in the summons for answer, is not merely an irregularity to be only corrected by motion in the court of original jurisdiction, but an error for which the judgment may be reversed, 34 O. S. 123; see 40 O. S. 344. Rule of court providing for notice in case of partial or interlocutory decree—no notice necessary in case of final decree, see 12 Bull 20, 23. The right to vacate is not waived by voluntary payment of the amount which the debtor admits to be due, 4 W. L. M. 581. And a payment made after the issuance of an execution to prevent a levy upon or a sale of the property of the defendant in execution is not such a voluntary payment as will preclude the party from setting aside the judgment for irregularity, 9 O. S. 506. An irregularity within the meaning of this subdivision is some act done or steps taken by the court either *sua sponte* or upon request, or by an officer thereof, which is not according to the regular course of procedure and by which the party was deprived of the benefit of the defense without fault on his part, 7 C. C. 72. Where a judgment entered was one of settlement of a litigation by agreement, informalities and irregularities in the action of a village council in the appointment of a committee to effect such settlement and in acceding to and ratifying the terms thereof are not irregulari-

ties within the meaning of the statute, *Id.* Absence of notice by referee an irregularity, 33 Bull 375. Grounds to be stated, 9 C. C. 72.

4. *For fraud practiced by successful party.* The special proceeding provided by this section is a cumulative remedy, and does not exclude or limit the right of a party by original action to impeach a judgment or enjoin its collection for fraud practiced by the successful party, 41 O. S. 514; 23 O. S. 415. A petition setting forth the issue in the action, and alleging that defendants entered into a conspiracy to, and did, testify falsely, and thereby obtained the judgment, evidence to sustain such allegations having been discovered since the trial, is sufficient under this subdivision, 39 O. S. 624. Where a petition to vacate avers that the judgment sought to be vacated was procured to be entered on default for answer without evidence, for a demand not founded on contract, express or implied, and its averments are admitted by demurrer, it discloses fraud in the prevailing party constituting a ground for vacation, 2 C. C. R. 143; but where the alleged fraud consisted in the fact that a bond in suit was in German, but the petition counted upon it as in English, and defendant, relying upon the statement in the petition that a party named on the bond was a surety, pleaded to that state of the case, whereas, in fact, the party was only a witness, this was held not sufficient to authorize the court to set the judgment aside for fraud practiced by the successful party, 5 Bull 353, 354. Representations made to the court by counsel of a party asking the entering of a judgment in the absence of counsel for the party against whom judgment is asked to the effect that such counsel has consented to the entry of the judgment, if false do not constitute a mere irregularity but a fraud, and may be vacated by petition under § 5358, and not by motion under § 5357; 49 O. S. 301. The filing of a petition pending the term at which judgment was rendered charging that the plaintiff's name had been forged to the note, and warrant of attorney upon which judgment had been entered in which fraud is not charged in the procuring of the judgment, and asking that the judgment be vacated and defendant perpetually enjoined from enforcing such judgment is the bringing of an action and not a proceeding authorized by this section, 25 Bull 28.

5. *Erroneous proceedings against infant.* The provisions of this subdivision do not apply when the fact of infancy appears in the record of the judgment, 45 O. S. 93; 17 Bull 230, 231. A married woman does not come within the protection of this subdivision, 6 Neb. 187. She did before the amendment of 82 v. 34; see 77 v. 46.

6. *For the death of one of the parties before judgment.* A judgment rendered against a party after his death may be vacated under this section on motion of his administrator, 28 O. S. 472. If a case has been tried and submitted to the court during the lives of the parties and one die before judgment is rendered, such judgment, when rendered, may be entered *nunc pro tunc* as of the trial term; see 6 O. S. 228; 14 Bull 52 s. c. 1 C. C. R. 59, 61; and where the representative of a deceased party defendant appears, or is made a party afterward, and submits himself to the jurisdiction of the court, the proceeding being simply ancillary to the original action, and in effect a continuation of it, such party is bound by any action the court may properly take in such proceeding relating to the proceedings or merits of the action, 14 Bull 52; 1 C. C. R. 59, 62.

7. *Unavoidable casualty or misfortune.* Absence from the state at the time of service of summons by leaving copy at residence, and ignorance of the pendency of the action, not unavoidable casualty or misfortune, 1 W. L. M. 278; nor ignorance of the time fixed by law for holding term of court, 2 Neb. 143; nor incorrect information received by attorney through messenger that there would be no court, 2 Bull 113; nor entering judgment in violation of agreement with opposing counsel, 4 Bull 289. (The petition did not allege what the defense was, nor what the errors were. Id. 291.) Illness of a party to the suit preventing his attendance at the trial is ground for setting judgment aside, 32 Kas. 319; but not the illness of a party's agent, 12 Bull 20, 22, nor the neglect of his counsel, 1 Clev. R. 18; see 1 Clev. R. 196; 2 Id. 204; but a proceeding to vacate a judgment of dismissal for want of prosecution, stating that plaintiff had died, and the administrator was not aware of the existence of the action at the time it was dismissed, and plaintiff's attorney did not attend to it because his authority had ceased on plaintiff's death, and because he supposed the administrator would attend to it, states a good ground for vacating judgment, 1 Clev. R. 178.

8. *Errors in judgment shown by infant.* Where, in a proceeding in error to which an infant is a party defendant, the supreme court reverses a judgment that had been rendered in his favor, and remands the cause to the court in which it had been rendered, with direction to render a judgment against the infant in accordance with its rulings, which is done, the judgment so rendered is the judgment of the court to which the cause had been remanded for judgment; and where the infant, on arriving at full age, would avail himself of the right secured to him by this subdivision, he must commence the proceeding in the court below, where the judgment was in fact rendered; it can not be commenced, in the first instance, in the supreme court, 45 O. S. 93; 17 Buff 230. A married woman does not come within the provisions of this subdivision, Id. 231.

9. *For taking judgment upon warrants of attorney, etc.* Where, under this subdivision, judgment was taken for more than was due and plaintiff remitted the excess by leave of the court, it was held the proceeding could properly be dismissed without vacating the judgment, 16 O. S. 133. Where plaintiff took judgment on warrant of attorney against the principal debtor and his sureties for an excessive amount, and the principal debtor brought suit against the judgment-plaintiff under this chapter within the limited period (§ 5363), but did not make the sureties parties to the proceedings until after the limited time had elapsed, after each of the judgment-defendants had notice of the judgment, the court had jurisdiction of the proceedings, and it was held to be error to dismiss the same on that ground, on motion of the judgment-plaintiff, 40 O. S. 70. Where judgment on warrant of attorney is opened by proceedings under this section, and, on issue joined, the amount of the judgment is reduced, and the plaintiff takes a second trial, which results in a finding in his favor of the same amount as on the former trial, it is not error to render judgment against him for the costs of the latter trial, 34 O. S. 142; see § 5324 n.; 7 O. (Pt. 2) 175.

10. 39 O. S. 624 is governed by subdivision 4. Limitation, see § 5363.

§ 5355. When judgment on service by publication may

be opened. A party against whom a judgment or order has been rendered, without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened, and be let in to defend; but before the judgment or order can be opened, the applicant shall give notice to the adverse party of his intention to make the application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; and each party may present affidavits. [51 v. 57, § 75; 56 v. 93, § 3; S. & C. 965, 1172.]

The notice required to be given to the adverse party under this section must be given to such party to the case as may be interested in maintaining the judgment, 30 O. S. 444. A decree obtained on publication of notice may be vacated without a trial upon the merits, 4 W. L. M. 581. This section can not apply to a case of service of a copy of the petition and summons on the defendant out of the state, Yapple's Pr., etc., 607, as that gives him actual notice of the pendency of the action in time to appear and defend; and if he has had such notice, he can not open the judgment, Id. A judgment of divorce rendered on service by publication may be opened up by defendant within five years from its rendition under this section, 30 Bull 96; see 45 O. S. 93; 3 C. C. 144; 34 Bull 189, 190.

§ 5356. Bona fide purchaser unaffected. The title to any property which is the subject of the judgment or order sought to be opened, and which, by or in consequence of the judgment or order, has passed to a purchaser in good faith, shall not be affected by any proceedings under the two preceding sections; nor shall the title to any property sold before judgment under an attachment be affected by said sections. [51 v. 57, § 75; S. & C. 965.]

See 35 O. S. 555; 2 C. C. R. 77, 81.

§ 5357. Proceedings to correct mistakes of clerk, etc. The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party, or his attorney, in the action (1); but the motion to vacate a judgment because of its rendition before the action regularly stood for trial, can be made only in the first three days of the succeeding term. [51 v. 57, § 535; S. & C. 1114.]

1. See notes, subdivision 3, § 5354. Notice must be given, 12 O. S. 136; 20 O. 344, and will not be presumed, 12 O. S. 136; but see 20 O. 344. When the adverse party appears and defends, the notice is waived, 43 O. S. 198.

§ 5358. When petition and affidavit must be filed. The proceedings to vacate the judgment or order on the grounds mentioned in subdivisions 4, 5, 6, 7, 8, 9, and 10, of § 5354, shall be by petition, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and, if the party applying was defendant, the defense to the action; and on such petition a summons shall issue and be served as in the commencement of an action. [74 v. 115, § 536.]

A party, by making application to vacate or modify a judgment, under § 5357 or this section, voluntarily submits himself to the jurisdiction of the court, and is bound by any judgment or order which may be afterward rendered in the action, 25 O. S. 340. Summons can not be served on attorney of record in such judgment, 8 W. L. M. 195. Demurrer or answer to such petition unnecessary, Id. Non-resident may be made defendant in such petition, by constructive service. Affidavit for publication and published notice must identify judgment to be vacated, Id. The procedure to procure the vacation of a judgment obtained by reason of false representations, viz., that counsel consented to its entry should be by petition under this section and not by motion under § 5357; 49 O. S. 301. See generally 25 Bull 28.

§ 5359. Grounds to vacate to be first tried. The court must first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the defense or cause of action. [51 v. 57, § 537; S. & C. 1115.]

Court required to determine whether party has a valid defense, and so finding, to permit him to file answer setting it up in original action to be tried under same rules as if answer had been filed before judgment, 29 Bull 341. See 9 C. C. 296.

§ 5360. Conditions on which judgment may be vacated or modified. A judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment was rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action; and when a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment. [51 v. 57, § 538; S. & C. 1115.]

There must be a valid defense to the action, 46 O. S. 639, 641; 7 C. C. 72. A finding on the merits on the final trial in favor of the party against whom the irregularity was committed is a sufficient compliance with this section, 25 O. S. 652. The section does not apply to cases where there is confessedly no such cause of action, or where the court had no jurisdiction over the person of the defendant, 9 O. S. 506, 510. It was not intended to deprive the

parties of their right to a jury trial under §§ 5359, 5360; and it is error in the court after deciding that there is a good ground to vacate to proceed to "try and decide" upon the validity of the defense in a case where the parties have a right to a trial by jury and do not waive that right, 24 O. S. 625; 26 O. S. 340. See 9 C. C. 74, 296.

§ 5361. When enforcement of judgment may be enjoined.

The party seeking to vacate or modify a judgment or order may obtain an injunction suspending proceedings on the whole or a part thereof, which injunction may be granted by the court, or any judge thereof, when it is rendered probable, by affidavit, or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified. [51 v. 57, § 539; S. & C. 1115.]

§ 5362. Suspension of execution, when judgment prematurely rendered. If the judgment was rendered before the action stood for trial, the suspension may be granted as provided in the preceding section, although no valid defense to the action be shown; and the court shall make such orders concerning the executions to be issued on the judgment as shall give to the defendant the same rights of delay he would have had if the judgment had been rendered at the proper time. [51 v. 57, § 540; S. & C. 1115.]

A judgment rendered by default before the expiration of the day named in the summons for answer may be reversed on error, 34 O. S. 123.

§ 5363. Limitations. Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivisions 4, 5, and 7, of § 5354, must be commenced within two years after the judgment was rendered or order made; proceedings for the causes mentioned in subdivisions 3 and 6 of the same section shall be commenced within three years, and in subdivision 9 within two years, after the defendant has notice of the judgment; and under subdivision 10 of the same section the proceedings may be commenced after the guilty party is convicted, if the conviction be within two years from the rendition of the judgment; but persons within the age of minority, of unsound mind, or imprisoned, may commence such proceeding within the respective times limited by this section after such disability is removed. [83 v. 74; 74 v. 115, § 541.]

Subdivision 3, § 5354. Limitation, 34 O. S. 204. Subdivision 9, § 5354; see 40 O. S. 70.

§ 5364. When full amount is not sued for and recovered. When, by mistake of the pleader, the amount

claimed in the pleading, and recovered, is less than the true amount then due, the party injured by the mistake may recover the balance by civil action, without costs.

Mistake of party taking judgment by default for less sum, etc., 20 O. S. 315.

§ 5365. Provisions of this chapter apply to supreme and probate courts. The provisions of this chapter shall apply to the supreme court and probate court, so far as the same may be applicable to their judgments or final orders; and in estimating time the probate court shall, for this purpose, be considered as holding, in each year, three terms, of four months each, the first commencing on the first of January of each year. [51 v. 57, § 542; S. & C. 1115.]

Judgments of the supreme court commission can be modified by the supreme court, 34 O. S. 672. Parties have not a right to a rehearing after the decision of a cause by the supreme court unless the application comes within the provisions of this section. Nor can such rehearing be ordered by the court after the term at which the judgment was entered if the case is not within those provisions, 26 O. S. 378. The provisions of § 5354, as extended by this section, do not confer power upon a probate court in proceedings instituted under § 5358 to vacate or modify its own orders previously made in the settlement of the accounts of executors and administrators, 26 O. S. 357.

CHAPTER VII.

REVIVOR OF, AND NEW PARTIES TO, JUDGMENT.

§ 5366. How parties not served made parties to judgments in case of joint contracts. When judgment is rendered in this state on a joint contract or instrument, parties to the action who were not summoned, and persons whose liability was not known to the plaintiff at the rendition of the judgment, may be made parties thereto by action in the same court, if they can be summoned in the state; or, when the judgment is rendered elsewhere, the plaintiff may bring suit upon such contract or instrument against the parties not summoned, or persons whose liability was unknown, in any county where any such parties reside or may be summoned. [48 v. 31, § 1; 56 v. 39, § 415; S. & C. 1060, 1149.]

In an action under this section to make a joint maker not served party to a judgment, it is no defense to show that the original action was brought before the maturity of the note, 42 O. S. 11; but where it was sought to make one a party to a judgment who was originally named as a party but not served, it was held a good defense to show that no judgment could have

been rendered against him if originally served, 19 O. 372. "Upon the peculiar facts of that case [19 O. 372] we have no disposition to question the entire soundness of the conclusion reached. No joint liability was ever incurred upon the note in suit, and so, in legal effect, the court found, although one of the defendants was in default," 42 O. S. 13.

§ 5367. *Revivor of dormant judgment or finding.* When a judgment, including judgments rendered by a justice of the peace or mayor, a transcript of which has been filed in the court of common pleas for execution, has become dormant, or when any finding for money in any equitable proceedings, which in whole or in part remains unpaid under the order of the court made therein, said judgment may be revived, or said finding may be made subject to execution as judgments at law are, in the same manner as prescribed for reviving actions before judgments, or by action in the court in which said judgment was rendered or finding made, or in which transcript of judgment may have been filed. When either party to such dormant judgment or finding, his agent or attorney, makes affidavit showing that the adverse party is a non-resident of the state, and that such judgment or finding remains unsatisfied, in whole or in part, and the amount owing thereon, service may be made by publication, as in other cases, but only for such judgments or findings in which personal service has originally been made on the adverse party. If sufficient cause be not shown to the contrary, the judgment shall stand revived, and the finding be subject to execution for the amount which the court finds to be due and unsatisfied thereon; and the lien of the judgment for the amount due shall be revived, and shall operate from the time of the entry of the conditional order or the filing of the petition. [91 v. 163.]

See § 5380. *Revivor of judgment of justice of the peace.* § 6681. Where a judgment is revived, it is revived with all its incidents as between the parties, 5 O. 178; but the title of a purchaser from the judgment debtor is, on the judgment becoming dormant, discharged from the lien, and the subsequent revivor of the judgment will not affect the title, *Id.*; 10 O. 403; 15 O. 301; 25 O. S. 358. If a judgment is obtained on unsealed process, and such judgment be afterwards revived without objection, the want of a seal does not impair the validity of the judgment, 15 O. 735. Revivor by summons to another county, 41 O. S. 678, by surety by conditional order, 48 O. S. 75, 82. See 52 O. S. 527,

§ 5368. *Id. Limitation.* An action to revive a judgment can only be brought within twenty-one years from

the time it became dormant, unless the party entitled to bring such action was, at the time the judgment became dormant, within the age of minority, of unsound mind, or imprisoned, in which cases the action may be brought within fifteen years after such disability is removed.

Not lien on lands acquired after original recovery. Date of lien, 52 O. S. 527.

See § 4978a. The section is constitutional, 50 O. S. 31 (73 v. 148). 29 Bull 148. Non-residence of defendant in the county and state or his absence therefrom and coverture of plaintiff are not disabilities that will prevent the running of the statute against the revivor of a judgment by motion and conditional order, *Id.*

§ 5369. **Revivor when party dies after judgment.** If either or both of the parties die after judgment rendered, and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the judgment, and the same may be revived by an action brought for that purpose; or they may be made parties thereto in the same manner as is prescribed for the revival of actions before judgment; and such judgment may be rendered and execution awarded as might or should have been given or awarded against the representatives, real or personal, or both, of such deceased party; and where any judgment or decree has been rendered in the circuit court of any county, and a mandate has been directed to the common pleas court to carry the same into execution, and if either or both parties thereto die before satisfaction thereof, the same may be revived in such common pleas court in conformity with this section. [82 v. 34; 77 v. 201; 51 v. 57, § 416; S. & C. 1060.]

A judgment *in personam*, under which no specific lien on real estate was acquired during the life time of the judgment debtor, can not be revived and enforced against the heirs, 29 O. S. 257. When an action has been dismissed, the defendant's personal representative may revive the same, 28 O. S. 472. Where a proceeding is brought under § 5354, subdiv. 9, within the statutory time and afterward by amendment sureties who are necessary parties to petition are made parties but not until more than the statutory time had elapsed after each party had notice of the judgment, the action is not barred, 40 O. S. 70. Decree for sale of real estate, revivor in name of personal representative before order of sale can be executed, 1 C. C. 32; see 35 O. S. 430.

§ 5370. **Partners may be made parties to judgment against firm.** The members of a partnership, against which a judgment has been rendered by its firm name, may be made parties to the judgment by action. [44 v. 66, § 4; S. & C. 1139.]

This section applies only to unincorporated companies. Neither corporations *de jure* nor *de facto* are within its provis-

ions. And an action can not be maintained under this section to charge the stockholders with the payment of a judgment against the corporation, 38 O. S. 269. Limitation of action, see 40 O. S. 37. When persons, who have taken steps toward incorporation and who conduct business in an associated name, may be charged on an individual liability as partners, 40 O. S. 9.

§ 5371. Sureties on bond of executor, etc., parties to judgment. Sureties to the bond of an executor, administrator, guardian, or trustee, may be made parties to a judgment thereon against the principal, by action. [51 v. 397, § 2; S. & C. 1139.]

DIVISION V. ENFORCEMENT OF JUDGMENT.

CHAPTER I.

EXECUTION.

SUBDIVISION I. KINDS OF EXECUTION.

§ 5372. Execution, how issued and directed. An execution is a process of the court, issued by the clerk, and directed to the sheriff of the county; and executions may be issued to the sheriffs of different counties at the same time. [51 v. 57, § 418; S. & C. 1062.]

In Ohio sales of real estate under decrees either final or interlocutory are to be conducted as upon execution at law. Orders of sale issued on such decrees are executions under §§ 5372 and 5373, 2 C. C. R. 390. A party entitled to an execution on a judgment may by mandamus compel the clerk of the court to issue the writ, if he refuses to do so after a legal demand therefor, 3 C. C. 581.

§ 5373. Kinds of executions. Executions are of three kinds:

1st. Against the property of the judgment debtor, including orders of sale.

2d. Against the person of the judgment debtor.

3d. For the delivery of the possession of real property, including real property sold under orders of sale; the writ shall contain a specific description of the property, and a command to the sheriff to deliver the property to the person entitled thereto; the writ may also require him to make the damages recovered for withholding the possession, and cost or costs alone, out of the property of the person who so withholds the possession. [87 v. 187.]

An order of sale issued in a proceeding to foreclose a mortgage, is not an execution within the purview of § 5416; 6 C. C. 62.

SUBDIVISION II. EXECUTION AGAINST PROPERTY.

§ 5374. Property subject to levy and sale. Lands and tenements, including vested interests therein (1), and permanent leasehold estates renewable forever (2), and goods and chattels (3), not exempt by law, shall be subject to the payment of debts, and shall be liable to be taken on execution and sold as hereinafter provided. [37 v. 44, § 1; 51 v. 57, § 420; S. & C. 1063, 1142.]

1. Curtesy of husband, 12 O. 79; 5 Bull 26; 1 Id. 173; devised property, the will exempting it from debt, 15 O. S. 419; equity of redemption, 10 O. 71; fraudulently conveyed land, 10 O. 162; 40 O. S. 107; possessory rights, 10 O. 403; 40 O. S. 635; vested remainder held under legal title, 31 O. S. 175; but equitable estates are not, 5 O. S. 253; 40 O. S. 117; nor trust estates, 1 O. 257; 16 O. 469; nor public property not held for private purposes, see 5 Bull 684; 4 Bull 75; nor property in the custody of a receiver, without leave of court, 10 O. S. 372, 404; 20 O. S. 137. 2. Perpetual leasehold, 13 O. 334; 11 O. 355. Leasehold property, see 4 Bull 961; 1 Id. 173. 3. Equity of redemption in chattel mortgage, 14 O. S. 457; 20 O. S. 38; exempt property until selected, 38 O. S. 416; growing crops, 11 O. 364; partnership goods, 16 O. 142; 18 O. 181; 12 O. S. 647; but unissued bank bills are not, W. 455; nor unissued bonds of a railroad company, 2 D. 465; nor property in the hands of a bailee, 16 O. 431; nor pledged property, 2 C. S. C. R. 299.

§ 5375. When lien of judgment attaches to lands or goods. Such lands and tenements, within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered (1); but judgments by confession (2), and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered; and all other lands, as well as goods and chattels of the debtor, shall be bound from the time they are seized in execution (3). [37 v. 44, § 1; 51 v. 57, § 421.]

Levy on land in other county. Entry on foreign execution docket. Subject to prior lien. Purchase after levy, 11 C. C. 412. Effect of judgment in state court prior to foreclosure in U. S. court, 34 Bull 56.

1. Lien held to date from 10 A. M., by rule of court fixed under 55 v. 83, though court met later, 17 O. S. 231; see 24 O. S. 150. 2. Formerly they were a lien from the first day of the term, 14 O. 514 (act 1831), and see 3 O. 65. Judgments confessed during term, postponed to judgments in pending actions, rendered at same term, 5 O. 48. 3. But where the officer indorsed a paper levy, and allowed the debtor to retain control of the property with power of use and sale in the usual course of business, the levy was held void and the goods and chattels subject to seizure on execution in favor of other creditors, 33 O. S. 85. When a valid levy has been made upon goods and chattels in the hands of the officer, a constructive levy of subsequent executions coming into his hands before sale may be made by indorsement merely; but when the original levy is a mere pa-

per levy, and therefore void, a constructive levy of actual executions will not bind the property against subsequent executions actually levied thereon, *Id.*; see 40 O. S. 335. No entry by the sheriff upon real estate is necessary to constitute a valid levy thereon, 38 O. S. 610. The levy of a foreign execution is complete when indorsed on the execution and before entry thereof, as required by § 1212, *Id.*; priority of, 8 C. C. 118; 7 *Id.* 285.

Extent of and property subject to judgment liens. Judgment liens exist only by statutory creation, 33 O. S. 379; 2 O. S. 36; 24 O. S. 379. To operate as such the judgment must be final, 8 O. 186; 33 O. S. 376. They are not vacated by appeal, 15 O. S. 310; see § 5376; nor affected by a second trial, 37 O. S. 392; nor by the organization of a new county including the incumbered land, 11 O. 98. A judgment lien is co-extensive with the jurisdiction of the court, 24 O. S. 379; 31 O. S. 175; of the Superior Court of Cincinnati with the county, 24 O. S. 379; of the United States courts with the state or district, 5 O. 398; 2 O. S. 37; see 31 O. S. 175; though the judgment may have been rendered in one of the judicial districts into which the state is divided and the property lies in another, 11 Bull 254, citing 6 Paige, ch. 465; 5 Rep. 616; 10 Chicago L. N. 228, 328; see 20 Bull 245; 34 *Id.* 56. The lien operates only on legal titles, 6 O. 156; 3 O. 514; 1 O. 318. An equity of redemption is subject to the lien, 2 O. 224; 15 O. S. 310; and land fraudulently conveyed, 10 O. 162; 8 O. 529; perpetual leases, 13 O. 334 (but not when conveyed prior to judgment, as security, 11 O. 355. An estate for years created by lien granting privilege of purchase subject to lien only from time of levy and seizure, 2 D. 544); an easement, 20 O. 401; a homestead, 42 O. S. 139; a vested remainder, 31 O. S. 175; but after-acquired property is not, 4 O. 92; nor equitable interests, 8 O. 21; 1 O. 318; nor husband's land for alimony, unless so ordered, 10 O. 268; nor land purchased before deed or possession, 40 O. S. 117; nor trust estates, 11 O. S. 84; 20 O. S. 68; nor land of landlord of liquor dealer without suit, 23 O. S. 619; nor assignor's land after assignment for creditors, 14 O. S. 200; nor land contracted to be sold, except to the extent of the unpaid purchase money, 20 O. S. 68. A balance due on foreclosure of a mortgage does not operate as a lien, 16 O. 449; nor a recognizance, until judgment, 5 O. 480; nor a judgment against a tenant in partition after order of sale, 22 O. S. 615; 8 *Id.* 646; nor a justice's judgment, 1 O. 318, unless a transcript is filed, 31 O. S. 273; and a lien does not attach to land and water-power leased of the state, 19 O. 399. Lien on land sold for purchase money preferred to lien of judgment creditors, without notice, 7 O. (Pt. 1), 225. Levy on chattels is a satisfaction while levy remains in force, but only sale of the lands under levy is a satisfaction, 5 O. 169. Priority of judgment liens to be determined as liens existed at time of assignment, 26 O. S. 63. Loaning of money to judgment debtor to be applied by him in part satisfaction of judgment which is a lien on debtor's land, does not operate to transfer such lien to lender, 32 O. S. 210. Judgment lien on land is not discharged against subsequent purchaser by fact that chattels were once levied upon and levy released by mutual consent of parties to the execution, 4 O. 378. Unrecorded mortgage postponed to lien of judgment recovered after date of mortgage, 14 O. 428. Lien of purchase money mortgage is superior to that of any judgment against purchaser, 39 O. S. 361. The statutory lien of a judgment of a separate creditor on lands held by a partnership, must be postponed to the equity of a firm creditor, 43 O. S. 38. Chattel mortgage void as against levy made to enforce a judgment upon execution after former was executed, but before its

delivery to proper officer, 42 O. S. 380. Decree for alimony, 50 O. S. 476.

§ 5376. **Lien of judgment of supreme court.** A judgment of the supreme court, for money, shall bind the lands and tenements of the debtor, within the county in which the suit originated, from the first day of the term at which the judgment is entered, and all other lands, and the goods and chattels, of the debtor, from the time they are seized in execution; but the lien of a judgment of the common pleas court, in an action which is appealed by the judgment debtor to the circuit court, and is thence removed into the supreme court, shall not be thereby divested or vacated, but shall continue till the final determination of the action in the supreme court. [82 v. 34; 51 v. 298, § 2; S. & C. 385.]

See § 5236; 15 O. S. 310.

§ 5377. **Transcripts of judgments of justices and mayors may be filed in common pleas court.** The party in whose favor a judgment is rendered by a justice of the peace, or mayor of a municipal corporation, may, at any time after judgment is rendered, if the same be not appealed or stayed, file in the office of the clerk of the court of common pleas of the county in which the judgment was rendered a transcript thereof, having certified therein the amount, if any, paid thereon; and thereupon the clerk shall enter the case on the execution docket, together with the amount of the judgment, and the time of filing the transcript; but if, within ten days after the rendition of the judgment, the judgment debtor pay the same, or give bail for stay of execution, the justice or mayor shall forthwith certify that fact to the clerk of the court of common pleas, who shall enter a memorandum thereof upon the execution docket; and the cost of the transcript, the filing thereof, and of the entry on the docket, shall be paid by the party who files the transcript, and taxed as increased costs, unless the judgment debtor pay the same, give bail for stay of execution, or appeals from the judgment rendered, within ten days after the rendition of the judgment. [85 v. 143.]

§ 5378. **When such lien attaches.** Such judgment, if the transcript be filed in term time, shall be a lien on the real estate of the judgment debtor within the county from the day the transcript is filed (1); and if filed in vacation, the judgment shall, as against the debtor, be a lien from the day it is filed, but as against other transcripts

filed in vacation, and judgments rendered at the next term of the court, it shall be a lien only from the first day of the next term (2). [57 v. 4, § 490; S. & C. 1093.]

1. Such lien does not become lost or removed from that part of the real estate thereafter set off as a family homestead by the assignment and use of such homestead, 42 O. S. 139. 2. Transcripts of judgments recovered before a justice of the peace were filed with the clerk in vacation in pursuance of this section, and the debtor afterward executed a mortgage, which was recorded before the next term of the court. In an action to adjust the liens between the mortgagee, the owners of the justice's judgments, and a creditor who obtained a judgment against the debtor at the next term of the court, and for distribution of the proceeds arising from the sale of the mortgaged premises, it was held that the proceeds remaining after deducting the amount due on the transcript judgments should be applied in satisfaction of the mortgage, and that any balance still remaining, together with the amount so deducted, should be applied *pro rata* in satisfaction of all the judgments, 31 O. S. 273, McIlvaine and Gilmore, JJ., dissenting. McIlvaine, J., cited 2 O. S. 114 as in point.

§ 5379. When execution may issue on such judgment. Execution may be issued on such judgment at any time after filing the transcript, as if the judgment had been rendered in court; but the lien shall remain as provided in the preceding section. [54 v. 21, § 491; S. & C. 1094.]

§ 5380. When judgment becomes dormant and ceases to be a lien. If execution on a judgment rendered in any court of record in this state, or a transcript of which has been filed as provided in § 5377, be not sued out within five years from the date of the judgment, or if five years intervene between the date of the last execution issued on such judgment and the time of suing out another execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor. [51 v. 57, § 422.]

See § 5367. Not a lien on lands acquired after original recovery, 52 O. S. 527. This section only requires the execution to be issued, 11 C. C. 424. The taking of an examination from the clerk's office by the plaintiff, or his attorney, and returning the same without delivering it to the sheriff, is not a suing out of execution within the meaning of this section; the writ must be actually or constructively delivered to the sheriff, 8 O. S. 415. Proceedings in error do not prevent the judgment from becoming dormant, 4 O. 459; but see § 5415. Where land is subject to two liens, the elder a judgment and the other a mortgage, and the judgment becomes dormant, its priority is lost, and the mortgage becomes the paramount lien, 10 O. 403. A senior judgment creditor who has not issued execution for more than five years is not entitled to money made by a sale of real estate under an execution upon a junior judgment, 4 O. 459. Revivor of judgment revives the lien, 5 O. 178, but does not affect title of purchaser, 15 O. 301. This section does not apply to a decree for the sale of specific property, 24 O. S. 445; 35 O. S. 430, but has sole

reference to judgments for money which are to be enforced by execution, *Id.*; 37 O. S. 116, 117. Execution issued on a dormant judgment will be set aside on motion, and the goods and money levied restored to the judgment debtor, 4 O. 459; but *quære*, whether a judicial sale of real estate upon process upon a dormant judgment can be impeached on that ground except by a petition in error to reverse the order of confirmation, 24 O. S. 445; assignment of homestead, effect, 31 Bull 206, 51 O. S. 220.

Dormancy during litigation. A judgment creditor who brings, or who was properly made a party to, an action to subject mortgaged land to sale, and to ascertain and marshal the liens thereon, will not lose his right to share in the proceeds of a sale because his judgment became dormant pending the action, 31 O. S. 175; 18 O. S. 376. The plaintiff in a proceeding in foreclosure, having more than one valid lien on the premises, will be protected only to the extent that he sets them up and asks relief; and if he has a subsisting judgment lien at the time he commences his action, and fails to set the same up in his petition, and such judgment, pending the proceedings, becomes dormant, the plaintiff can not afterward set the same up by amendment and have it enforced against the liens of other parties in the case, 31 O. S. 215. Where a judgment has become dormant during the pendency of a provisional injunction against execution thereon, the court will, on final dissolution of the injunction, order execution to issue for the balance equitably due, 17 O. S. 320; but when the judgment debtor sold and conveyed the land to a purchaser without notice, who paid the purchase money, and the judgment became dormant because of an injunction preventing the issuing of an execution, the purchaser took the land discharged of the lien, 25 O. S. 355. Execution on dormant judgment not void but voidable and sale under it will pass title, W. 738. In an equitable action to sell under a mortgage and marshal liens, a judgment creditor who was made a party while his judgment was alive, will not lose his right under distribution by his judgment becoming dormant, 18 O. S. 376. Decree for alimony a lien on real estate of judgment creditor and estate descends subject to lien though no execution is issued, 4 C. C. 313. Five years must intervene between the date of the execution and the commencement of the action, 5 C. C. 393; 8 *Id.* 276.

§ 5381. The command and indorsement of the writ of execution. The writ of execution against the property of the judgment debtor, issuing from any court of record, shall command the officer to whom it is directed that of the goods and chattels of the debtor he cause to be made the money specified in the writ, and, for want of goods and chattels, shall cause the lands and tenements of said debtor to be sold for cash. But if the court rendering the judgment or decree so orders, real estate may be sold under writ of execution on the following terms: One third cash on the day of sale, one third in one year, one third in two years thereafter, with interest on deferred payments, to be secured by mortgage on the premises so sold. But an execution issued on a judgment rendered against a partnership firm, by its firm name, shall operate only on the part-

nership property; and the exact amount of the debt, damages, and costs for which the judgment is entered shall be indorsed on the execution. [86 v. 372; 51 v. 57, § 423.]

Partnership, see §§ 5011, 5042. Judgment lien of separate creditor postponed to equity of firm creditor whose claim accrued during continuance of partnership, though subsequent to time such lien attached, 43 O. S. 38. Sale under imperfect writ set aside, 9 O. S. 366. The exact amount of the debt, etc., shall be indorsed on the execution, 25 O. S. 325. Real estate levied on during the life of judgment debtor, may be sold under the levy after his death, without making his representatives parties to the judgment, 25 O. S. 542. Execution issued after the death of defendant upon a judgment rendered in his life time and levied upon lands of which he died seized, sale void, 2 O. 287; 5 O. 221. Levy not set aside for mistake of officer in making his indorsement on the execution, 5 C. C. 391. Amercement of sheriff for neglect or refusal to return order of sale, § 559*nn*; 7 C. C. 55.

§ 5382. In what cases no preference given to executions. When two or more writs of execution against the same debtor are sued out during the term in which judgment was rendered, or within ten days thereafter, and when two or more writs of execution against the same debtor are delivered to the officer on the same day, no preference shall be given to either of such writs; but if a sufficient sum of money be not made to satisfy all executions, the amount made shall be distributed to the several creditors in proportion to the amount of their respective demands; in all other cases the writ of execution first delivered to the officer shall be first satisfied; and the officer shall indorse on every writ of execution the time when he received the same; but nothing herein contained shall be so construed as to affect any preferable lien which a judgment on which execution issued has on the lands of the judgment debtor. [51 v. 57, § 424; S. & C. 1069.]

This section applies only to executions from the same court, 2 H. 159, and to liens which are equal, and not to cases where, upon other principles, one party has a preferable lien, 2 O. 396; 3 O. 366; 13 O. 334. The clause "in all other cases the writ of execution first delivered," etc., relates to executions in the hands of the officer at the time of the sale, and not to writs returned with or without levy, 5 Neb. 43. When several executions are levied upon the same lands, separate proceedings and appraisements, etc., under each are unnecessary, 5 O. 522. Two executions of the same kind may be issued on the same judgment, 16 O. 27. Of judgments rendered at the same term and levied within the year, one does not gain a preference from the

fact that it was first levied, 13 O. 334. Sheriff's duty to levy executions in the order in which they are delivered to him though holder of second execution points out property wheron to levy, 7 Bull 148. Distribution, see 19 O. 408.

§ 5383. **Goods and chattels to be first taken; for want thereof, lands to be levied on.** The officer to whom a writ of execution is delivered shall proceed, immediately, to levy the same upon the goods and chattels of the debtor; but if no goods and chattels can be found, the officer shall indorse on the execution the words "no goods," and forthwith levy the same upon the lands and tenements of the debtor which are liable to satisfy the judgment. [51 v. 57, § 425; S. & C. 1069.]

Goods and chattels, when levied upon, ought to be taken into the possession of sheriff, 4 O. 45. If they are of sufficient value to satisfy the debt, and are lost by carelessness of the sheriff, he will be liable to the creditor, and may be made to pay the debt, Id. If levy is made before return day of the writ, sale may be had afterwards. The rule applies to the order of sale, 7 Neb. 226. Return of writ without sale is an abandonment of levy on personal property, 10 Neb. 419; see, generally, as to sufficiency of levy on personal property, 2 O. 297; 6 O. 449; 10 O. S. 488; 14 O. S. 13; 13 O. S. 79; 33 O. S. 85; 1 D. 405; 45 O. S. 222. If property levied on in execution and sold is susceptible of division and the constable sells more than is necessary to pay the claim and the costs, he will be responsible to the debtor for the property thus sold unnecessarily, 27 O. S. 521, 525. What is necessary to constitute a valid levy on personal property as against subsequent mortgagee, 13 O. S. 79. Personal property in the possession of the mortgagor until condition broken, may be seized on execution, 5 O. S. 93. The rule that an officer is justified by his process not void on its face is a rule of protection only. He may execute such process and justify himself, or he may refuse to act on a void process and no action will lie for such refusal, 29 O. S. 617.

§ 5384. **Id. When officer may take bond for their delivery.** When a sheriff, coroner, or other officer, levies, by virtue of an execution, upon any goods and chattels which afterward remain upon his hands unsold for want of bidders, for the want of time to advertise and sell, or for any other reasonable cause, the officer may, for his own security, take of the defendant an undertaking, with security, in such sum as he deems sufficient, to the effect that the property shall be delivered to the officer holding an execution for the sale of the same, at the time and place appointed by such officer, either by notice given in writing to the defendant in execution, or by advertisement published in a newspaper printed in the county, naming therein the day and place of sale; and if the defendant fail to deliver the goods and chattels at

the time and place mentioned in the notice to him given, or to pay to the officer holding the execution the full value of such goods and chattels, or the amount of the debt and costs, the undertaking shall be considered as broken, and may be proceeded on as in other cases. [51 v. 57, § 429; S. & C. 1071.]

See 2 O. 297; 6 O. 450; 15 O. 65; 1 D. 144; § 5375n.

§ 5385. Notice of sale of goods on execution. The officer who levies upon goods and chattels by virtue of an execution issued by a court of record shall, before he proceeds to sell the same, cause public notice to be given of the time and place of sale, for at least ten days before the day of sale, which notice shall be given by advertisement published in a newspaper printed in the county, or, if no newspaper is printed therein, by posting advertisements in five public places in the county, two of which shall be put up in the township where the sale is to be held. [66 v. 23, § 430.]

Where a statute of the state requires a publication to be made in a "newspaper," in the absence of any provision to the contrary, a paper published in the English language is to be understood as intended; and a publication in a paper printed in any other language is not a compliance with the statute, 26 O. S. 49. The making an inventory not necessary to constitute valid levy upon personal property, 10 O. S. 488 (1860).

§ 5386. Alias execution against unsold goods. When goods and chattels levied upon by execution can not be sold for want of bidders, or want of time, the officer who makes the return shall annex to the execution a true and perfect inventory of the goods and chattels remaining unsold; and the plaintiff in such execution may thereupon have another execution issued, directing the sale of the property levied upon; but such goods and chattels shall not be sold unless the time and place of sale be advertised as directed in the preceding section. [66 v. 23, § 430.]

An order of sale of personal property under this section presupposes a previous valid levy; but where there is but a mere paper levy, which is void, or where there has been a valid levy which has become fraudulent and void as against subsequent creditors, such an order of sale is inoperative as against subsequent executions actually levied on the property, 33 O. S. 85. Where an order of sale, founded on such void levy, contains a clause for an additional levy under § 5388, it is valid as a *fi. fa.* execution only, which may be levied on the property specified in the original void levy as well as upon other property, *Id.* Where property easily removable is seized in execution, but left in the possession and use of the defendant, a delay for an un-

reasonable time to offer said property for sale with the sanction and assent of the plaintiff will have the effect of postponing such levy to one made upon a junior execution, 14 O. S. 18.

§ 5387. Public and private sale of goods on execution. All sales of goods and chattels shall be at public auction; but the court from which an execution or order of sale issues, or a judge thereof in vacation, may, on good cause shown, on application of either party, and due notice to the adverse party, make an order directing the sheriff, or other officer holding the process, to sell such goods and chattels at private sale for cash, specifying the time, not extending beyond the return day of the process, during which such sale will continue; but before such private sale is made, the court shall order such personal property to be appraised by three disinterested persons; and the property shall not be so sold for less than two-thirds the appraised value thereof. [66 v. 23. § 430.]

Private sale by sheriff holding under levies without order of court not an abandonment of levies, 40 O. S. 569.

§ 5388. Further writ of execution may direct another levy if the first be insufficient. When a writ is issued directing the sale of property previously taken in execution, the officer who issues the writ shall, if requested by the person entitled to the benefit thereof, or his agent or attorney, add thereto a command to the officer to whom the writ is directed, that if, in his opinion, the property remaining in his hands not sold is insufficient to satisfy the judgment, he shall levy the same upon lands and tenements, goods and chattels, or either, of the judgment debtor, as the law permits, sufficient to satisfy the debt. [51 v. 57, § 431; S. & C. 1072.]

See § 5386n; 33 O. S. 85.

§ 5389. Land to be appraised before sale by three freeholders. When execution is levied upon lands and tenements, the officer who makes the levy shall call an inquest of three disinterested freeholders, who shall be residents of the county where the lands taken in execution are situate, and administer to them an oath impartially to appraise the property so levied upon, upon actual view; and such freeholders shall forthwith return to such officer, under their hands, an estimate of the real value of the property in money. [51 v. 57, § 432; S. & C. 1073.]

Sale in chancery requires an appraisement, 1 O. 509; but a

sale made to one not a party to the action, without an appraisement, vests in him a good title, 3 O. 187, overruling 1 O. 27; and want of appraisement can not be objected to after confirmation, W. 458. Court can not correct mistake in appraisement, 10 O. S. 557; but mistake can be corrected in equity, 35 O. S. 555. Where there are two executions and levies of the same date, and an appraisement on each, and a second appraisement on one, no valid sale can be made on the other upon such second appraisement, 2 O. S. 406, 408. In sale upon execution of the interest of a mortgagor, the appraisal must be of the entire estate, 8 O. 21; but land appraised as an entirety may be sold in parcels, 19 O. 19; 3 W. L. G. 245. Return of sheriff is *prima facie* evidence of the amount and nature of the appraisement, 29 O. S. 636. Return should show that appraisers are residents of the county, 1 Neb. 409. Return need not embody or copy the appraisement, 2 O. S. 406. Actual view by appraisers necessary, 10 W. L. J. 207. Law in force at time of sale governs, 8 O. 187. In an action to foreclose a mortgage and marshal liens, a court is not authorized to order an appraisement "subject to a certain undetermined indebtedness," 3 C. C. 144.

§ 5390. Copy of appraisement to be deposited with clerk. When the officer receives the return he shall forthwith deposit a copy thereof with the clerk of the court from which the writ issued, and immediately advertise and sell such real estate, agreeably to the provisions of this chapter. [51 v. 57, § 433; S. & C. 1073.]

Copy of appraisement must be deposited with clerk before advertisement or sale will be set aside on motion, 3 W. L. M. 319. Such defect, after confirmation, would not impair purchaser's title, 2 D. 503. Copy of appraisement deposited with clerk can not be considered by the reviewing court, unless embodied in a bill of exceptions, 29 O. S. 636.

§ 5391. Extent of lien. Lands not to be sold for less than two-thirds of appraisement, except for debts, etc., due state. If, upon such return, it appear by the inquisition that two-thirds of the appraised value of the lands and tenements so levied upon is sufficient to satisfy the execution, with costs, the judgment on which the execution issued shall not operate as a lien on the residue of the debtor's estate, to the prejudice of any other judgment creditor; but no tract of land shall be sold for less than two-thirds of the value returned in the inquest; and nothing in this section contained shall affect the sale of lands by the state; but all lands, the property of individuals indebted to the state for any debt or taxes, or in any other manner, except for loans heretofore authorized by the legislature, shall be sold without valuation, for the discharge of such debt or taxes, agreeably to the laws for such case made and provided. [51 v. 57, § 434; S. & C. 1073.]

Sale for debt due state without valuation, 2 O. S. 323; see 7 C. C. 285.

§ 5392. Property of certain officers to be sold without valuation. If the property of a clerk, sheriff, coroner, justice of the peace, or constable, or of a collector of state, county, municipal corporation, or township tax, be levied on, for or on account of any money by him collected or received in his official capacity, the property so levied on shall be sold without valuation. [51 v. 57, § 435; S. & C. 1074.]

§ 5393. Notice of sale of lands. Lands and tenements taken in execution shall not be sold until the officer causes to be given public notice of the time and place of sale, for at least thirty days before the day of sale, by advertisement in a newspaper printed and of general circulation in the county, or, if no newspaper is printed in the county, in a newspaper of general circulation therein, and by putting up an advertisement of the same upon the court-house door, and in five other public places in the county, two of which shall be in the township where the lands and tenements are situate; when the advertisement is made in a newspaper published weekly, it shall be sufficient to insert it in five consecutive numbers thereof; but if there is published both a daily and weekly edition of the newspaper selected for such advertisement, and the circulation of the daily in the county exceeds that of the weekly, or, if the lands and tenements taken in execution are situate in any city in this state, and there is published both a daily and weekly edition of the newspaper selected for such advertisement, and the circulation of the daily in such city exceeds that of the weekly, it shall be sufficient to publish the advertisement in the daily once a week, for five consecutive weeks, before the day of sale, each insertion to be on the same day of the week; but the expense of such publication in a daily newspaper shall not exceed the cost of publishing the same in a weekly newspaper; and all sales made without such advertisement shall be set aside, on motion, by the court to which the execution is returnable. [56 v. 242, § 436; S. & C. 1074.]

When a newspaper is printed in the county, it is sufficient for the sheriff to advertise sales upon execution in it, and it is not required that he should put up notices on the door of the court-house and at other places, 2 O. 78; 7 Neb. 459; 8 Id. 482. In computing the time for which notice of a sale on execution should be advertised before the day of sale, as prescribed in this section,

the day on which the notice was first published may be included, and the day of sale must be excluded. § 4951 does not apply in such case. When the notice is published in a daily paper, as authorized by this section, it is sufficient if the first publication be thirty days before the day of sale, 25 O. S. 186. Where notice of the time and place of sale by a sheriff is advertised for thirty days before the day of sale in a weekly newspaper, it is no objection that the first number containing the notice was printed and published in advance of the day of the week on which the publication was usually made, 29 O. S. 636. Where an advertisement of a judicial sale is published in a semi-weekly newspaper, it is not necessary that each insertion should be on the same day of the week; but where an advertisement of a judicial sale is published in a daily newspaper, and each insertion is not on the same day of the week, this is not a mere irregularity in the proceedings, but is such a defect as that a motion to set aside the sale made thereunder on that ground, made before confirmation, should be sustained, 1 C. C. R. 569.

§ 5394. Publication of notice in German newspapers.

In any county wherein is published and printed a newspaper in the German language, and which has a circulation of at least five hundred and fifty copies to *bona fide* subscribers within the county, the notice required by the preceding section shall, in addition to the publication therein required, be published in such newspaper in the German language, for the same time and in the same manner, if the appraised value of the property to be sold exceeds five hundred dollars, and if two or more such papers are printed and published therein, the publication may be in either, but the court shall, on motion of the plaintiff or defendant, and may without motion, for good cause, dispense with such publication, and in any county the court may, if it deem the interests of the defendant require it, direct the publication of the notice in a newspaper printed in the Bohemian language, in addition to the publication required by the preceding section; but no error or mistake in translation, or in any publication authorized by this section, shall delay proceedings, or affect the title of the property sold, and if any such error or mistake occur by the negligence of the publisher, he shall not be entitled to compensation for the publication. [88 v. 267.]

§ 5395. Return of the writ and record thereof. The sheriff shall indorse on the writ his proceedings thereon, and the clerk shall immediately, upon the return thereof, record at length, in the execution docket, or other docket provided for that purpose, all

such indorsements; and the record shall be held to be a part of the record of the court. [46 v. 95, § 1; 49 v. 25, § 1; S. & C. 1148, 1149.]

The failure of the sheriff to file in the clerk's office his return on an alias order of sale within sixty days from the date of issuing, is not such an irregularity or neglect in the proceedings as will be regarded on error after confirmation of a sale thereunder, 1 C. C. 569.

§ 5396. Duty of sheriff when money made without sale of real estate. If the sheriff collect any part of a judgment by virtue of an execution, without the sale of real estate, he shall pay the same to the judgment creditor, or his attorney, upon demand made therefor at his office; and if the execution be fully satisfied, he shall return it within three days after he has collected the money thereon. [54 v. 104, § 1; S. & C. 1153.]

Sheriff is bound to pay over money returned as paid down at sale, 16 O. S. 382. That he takes notes in his own name does not alter his liability, 16 O. S. 389.

§ 5397. Purchaser failing to pay punished as for contempt. The court from which any execution or order of sale issues shall, upon notice, and motion of the officer who makes the sale, or of an interested party, punish as for contempt any purchaser of real property who fails to pay the purchase money therefor. [76 v. 27, § 1.]

A judgment creditor can not maintain an action against the purchaser of real estate at sheriff's sale to recover damages for the breach of the contract of sale, 29 O. S. 529.

§ 5398. Confirmation of sale. Order for deed. If, upon the return of any writ of execution, for the satisfaction of which lands and tenements have been sold, it be found by the court, on careful examination of the proceedings of the officer, that the sale has been made, in all respects, in conformity to the provisions of this title, the clerk shall be directed to make an entry on the journal that the court is satisfied of the legality of such sale, and that the officer make to the purchaser a deed for the lands and tenements; and the officer, on making the sale, may retain the purchase money in his hands until the court examines his proceedings, when he shall pay the same to the person entitled thereto agreeably to the order of the court. [51 v. 57, § 437; S. & C. 1074.]

The proceedings of the sheriff must be examined and approved by the court, and an order directing it obtained before the execution of a deed, and if this course be not shown to have

been pursued a deed by the sheriff to the purchaser will not be received as evidence of title, 1 O. 278. On a motion to confirm a sale, the court has discretionary powers, and if it appear that the notice was published in a paper not of general circulation in the county it may refuse to confirm the sale, 16 O. 563; but on such motion the court can only look to the execution and proceedings under it, and can not look into irregularities in obtaining the judgment or in the order awarding execution, 2 O. 360; see 2 C. S. C. R. 261; 9 O. 37. Payment of judgment prevents confirmation, 42 O. S. 292; but a defect in description not affecting the price does not, 29 O. S. 636. Purchaser not objecting not excused by delay resulting in depreciation of property, 15 O. S. 548. Confirmation will not be made after an appeal, 10 O. S. 617. An appeal does not lie from an order confirming or refusing to confirm a sale, 13 O. S. 574; nor from an order of the probate court setting aside a sale made by an assignee for the benefit of creditors, 31 O. S. 201; nor in partition, 10 Rec. 485. Confirmation refused for combination of bidders, 10 O. 476; 2 D. 213; for misapprehension as to terms on which sale was made, 7 O. (Pt. 2) 49. Sale on election day set aside, 4 Bull 912; set aside for mistake as to identity of subject matter of sale, 11 Bull 56; but after confirmation, fraud in bidding can not be set up by purchaser, 1 Clev. R. 6; see 2 C. S. C. R. 201; nor mistake or uncertainty in order, 29 O. S. 651. Confirmation is *res adjudicata*, 15 O. S. 548. Resale not at purchaser's risk, unless so ordered, 29 O. S. 529. Rights of purchaser, 11 Bull 13, 31; 19 Bull 221. Where an order confirming a sale made by the sheriff to a plaintiff in execution, is reversed on error after the execution of the sheriff's deed and before any legal conveyance by the purchaser, the title, if any, acquired by the sheriff's deed is divested by the order of reversal, 15 O. S. 337. The levy of an execution in favor of a judgment creditor of a purchaser at master commissioner's sale levied on the premises bought at said sale after confirmation and order for deed but before the purchaser had possession or a deed of the same is invalid, 40 O. S. 117. Where an order confirming a sale made under a decree of foreclosure to a mortgagee who is a party is at the same time vacated, and the sale set aside, the insurable interest of the mortgagor in possession is the same in the property as if such sale and confirmation had not been made, 38 O. S. 672.

§ 5398a. **Right of judgment debtor to redeem at any time prior to confirmation.** That in all sales of real estate on execution or order of sale the judgment debtor may, at any time before the confirmation of the sale thereof, redeem the same from such sale by depositing in the hands of the clerk of the court to which such execution [or order] is returnable, the amount of the judgment or judgments or decree upon which such lands were sold, with all costs, including poundage, together with interest at the rate of eight per cent. per annum on the purchase money from the day of sale to the time of making such deposit, or, if the same is made in vacation, to the first day

of the next term, except where the judgment creditor is the purchaser, then only interest at said rate on the excess above his claim; and the court shall thereupon make an order setting aside such sale, and apply said deposit to the payment of such judgment or judgments or decree and costs aforesaid, and award such interest to the purchaser, who shall receive from the officer making such sale the purchase money paid by him, and the interest aforesaid from said clerk; but nothing in this supplementary section contained shall be held to take away the power of the court to set aside such sale for any reason for which the same might have been set aside prior to the enactment hereof. [85 v. 283.]

§ 5399. When master commissioner may convey real estate. Real property may be conveyed by a master commissioner or special master only,

[1] When, by an order or judgment in an action or proceeding, a party is ordered to convey such property to another, and he neglects or refuses to comply with the order or judgment, and the master is directed to convey on failure of the party to comply with the order.

[2] When specific real property is sold by a master under an order or judgment of the court; but no court within this state shall make or issue an order to any master commissioner for the sale of any real estate, unless there exist some special reason or reasons why the sale of said real estate should not be made by the sheriff of the county where said decree or order shall be made, which said reason or reasons, if the court shall find any such to exist, shall be embodied by said court in and made part of its judgment, order or decree ordering such sale. [81 v. 194; 51 v. 57, § 595; S. & C. 1057.]

An order of sale to the "sheriff or master," without naming him, and executed by a master, is good after confirmation, 29 O. S. 651.

§ 5400. When sheriff may act as and for master commissioner. A master commissioner or special master who sells real property shall have the same power to administer oaths that is conferred upon the sheriff; a sheriff may act as a master commissioner, and shall, also, on notice, and for a reasonable compensation to be paid by the master commissioner out of his fees, attend and make

sale for any such commissioner who, by reason of sickness, is unable to attend; and sales made by a master shall conform, in all respects, to the laws regulating sales of lands upon execution. [43 v. 87, § 1; 51 v. 57, § 396; 72 v. 68, § 1; S. & C. 1057, 1148.]

Investment of balance of fund by order of court; sheriff's liability, 43 O. S. 380.

§ 5401. **Deed of sheriff, master, etc. Recitals.** An officer, including a master commissioner and a special master, who sells real property, shall, on confirmation of the sale, make to the purchaser a deed, which shall contain the names of the parties to the judgment, the date and amount of the judgment, the substance of the execution or order on which the property was sold, the substance of the officer's return thereon, and the order of confirmation; and the deed shall be executed, acknowledged, and recorded as is provided with respect to other deeds. [51 v. 57, §§ 397, 438; S. & C. 1057, 1075.]

Execution of deed by deputy sufficient, 4 O. 88. Under act 1811, acknowledgment before justice sufficient, 15 O. 735. Under act 1795, acknowledgment must be in open court, 1 O. 281. It is sufficient that a sheriff's deed recites so much of the execution and proceedings as show a clear and undoubted authority for the execution of the deed, 8 O. 128; 10 O. 433.

§ 5402. **Effect of deed of sheriff, master, etc.** The deed shall be *prima facie* evidence of the legality and regularity of the sale; and all the estate and interest of the person whose property the officer so professed to sell and convey, whether that interest existed at the time the property became liable to satisfy the judgment, or was acquired subsequently, shall be thereby vested in the purchaser. [51 v. 57, § 438; S. & C. 1075.]

A sheriff's deed takes effect from the day of sale, and passes the interest the judgment debtor had at the time of the levy 11 O. 235. And its recitals of the judgment, execution, levy, and sale are *prima facie* evidence that the land it conveys was levied upon and sold; but such evidence may be rebutted by other evidence that the land levied upon and sold is not the land covered by the deed, 6 O. 536. At sheriff's sale the rule of *caveat emptor* applies and the purchaser takes, subject to every lien that could be asserted against debtor, 2 O. S. 36; 5 O. 49; 19 O. 21. If land be sold by virtue of an execution upon a judgment against several defendants only a part of whom have been served by summons, a title to a proportion, if not the whole will pass to a purchaser at the sheriff's sale, 16 O. 271. The purchaser at sheriff's sale without notice of a dormant equity prior

to the return of the execution, takes title as a *bona fide* purchaser without notice, although the sheriff's deed bears date subsequent to actual notice given after the sale, 14 O. 286. When the creditor whose debt is secured by mortgage recovers judgment for the same debt, takes out execution and causes the mortgaged premises to be sold, the purchaser takes an indefeasible title, although the money made is not sufficient to satisfy the entire debt, 15 O. 84; 15 O. 468. As to taxes, 3 O. 8. 277; 13 O. 8. 201. Parol evidence to prove mistake, 35 O. S. 556.

§ 5403. Printer's fees may be required in advance. The officer who makes a levy, or holds an order of sale, may, before giving notice of the sale, demand of the plaintiff, his agent or attorney, the fees of the printer for publishing such notice; and in such case the officer shall not be required to make such publication until the fees are paid. [51 v. 57, §§ 439, 440; S. & C. 1078.]

§ 5404. Where sales take place. Officer or appraiser can not purchase. All sales of lands or tenements under execution or order of sale shall be held in the county in which such lands and tenements are situate, and at the court-house, unless otherwise ordered by the court; and purchases of real or personal property, by the officer making sale thereof, or by an appraiser of such property, shall be considered fraudulent and void; but this section shall not affect, unless for fraud, sales by executors, administrators, or guardians, prior to March 29, 1841. [39 v. 42, §§ 1, 2; 51 v. 57, § 441; S. & C. 1079, 1147.]

Purchase by appraiser voidable only, 14 O. S. 80; by executors etc., 8 O. 57. Although one executor can not purchase at a sale by his co-executors yet such a sale may be executed with the subsequent assent and ratification of the heirs, 10 O. 118. An administrator can not be directly or indirectly interested as a purchaser at his own sale of lands of the intestate, neither can he act as the agent of others with a view of making profits out of such purchases while his relation as trustee is still subsisting, 27 O. S. 160.

§ 5405. Alias execution against lands. If lands and tenements levied on, or ordered to be sold, be not sold upon one execution, other executions may be issued to sell the same. [51 v. 57, § 442.] 8 C. C. 268.

§ 5406. Proceedings when creditors direct separate levies to be made on separate parcels of land. When two or more executions come to the hands of an officer, and it is necessary to levy on real estate to satisfy the same, and either of the judgment creditors, or his assignee, requires the officer to make a separate levy to satisfy his execution or executions, the officer shall obey the direction; but the officer who makes the levy on be-

half of the creditor whose execution may, by the provisions of this chapter, be entitled to a preference, shall have the choice of such part of the real property of the judgment debtor or debtors as will be sufficient, at two-thirds of the appraised value, to satisfy the same; when two or more executions, which are entitled to no preference as to each other, are put in the hands of the same officer, he shall, when required, levy the same on separate parcels of the real property of the judgment debtor or debtors, if, in the opinion of the appraisers, the same may be divided without material injury; and if the real property of such debtor or debtors be not sufficient, at two-thirds of its appraised value, to satisfy all the executions chargeable thereon, such part of the same shall be levied on, to satisfy each execution, as will bear the same proportion in value to the whole, as the amount due on the execution bears to the amount of all the executions chargeable thereon, as near as may be, according to the appraised value of each separate parcel. [51 v. 57.]

7 Bull 148; 1 Clev. Rep. 86.

§ 5407. **Successor of sheriff may make deeds for lands sold by predecessor.** If the term of service of the officer who makes sale of any lands and tenements expires, or if such officer die, be absent, or unable from any cause to make a deed of conveyance of the property sold, any successor of such officer, on receiving a certificate from the court from which execution issued for the sale of the lands and tenements, signed by the clerk, by order of the court, setting forth that sufficient proof has been made that the sale was fairly and legally made, and, on tender of the purchase money, or if the same, or any part thereof, has been paid, then, on proof of such payment, and tender of the balance, if any, may execute to the purchaser, or his legal representative, a deed of conveyance of the lands and tenements sold; and such deed shall be as good and valid in law, and have the same effect, as if the officer who made the sale had executed the same. [51 v. 57, § 444; S. & C. 1079.]

§ 5408. **After satisfaction of execution, balance to be paid to defendant.*** When, on any sale made as aforesaid, there is in the hands of the officer more money than is sufficient to satisfy the writ or writs of execution, with interest and costs, the officer shall, on demand, pay the

balance to the defendant in execution, or his legal representatives. [51 v. 57, § 445; S. & C. 1080.]

The owner of land incumbered by a judgment lien may recover from the judgment creditor an excess over the balance due on the judgment received by the latter on a sale under a vendi, 40 O. S. 253.

§ 5409. **Reversal of judgment not to affect title of purchaser.** If a judgment, in satisfaction of which lands or tenements are sold, be thereafter reversed, such reversal shall not defeat or affect the title of the purchaser; but in such case restitution shall be made by the judgment creditor, of the money for which such lands or tenements were sold, with lawful interest from the day of sale. [51 v. 57, § 446; S. & C. 1080.]

14 O. S. 349; 27 O. S. 471. Notice to a purchaser, at administrator's sale to pay debts, that an effort would be made to reverse the order, does not affect the purchaser's title, though the order is subsequently reversed, 3 O. S. 389. "But this statutory rule, which applies only to purchases by strangers, does not apply to a mortgagee who is a party, nor where the order of sale or confirmation is reversed. In such cases the rule is as stated in *McBain's case*," 38 O. S. 672, 676. In *McBain's case* it was held that where an order confirming a sale to a party is reversed after a sheriff's deed has been executed, the title, if any, of the purchaser is divested by the order of reversal, 15 O. S. 337. Mistake corrected in equity after confirmation, see 35 O. S. 555.

§ 5410. **Remedy of purchaser at sale, if sale invalid.** If, upon the sale of property on execution, the title of the purchaser is invalid by reason of a defect in the proceedings, the purchaser may be subrogated to the right of the creditor against the debtor, to the extent of the money paid and applied to the debtor's benefit, and, to the same extent, shall have a lien on the property sold, as against all persons, except *bona fide* purchasers without notice; but this section shall not be construed to require the creditor to refund the purchase money, by reason of the invalidity of any such sales. [44 v. 114, § 1.]

2 N. P. 415.

§ 5411. **Remedy in other cases of invalid sales.** The last section shall apply, also, to all sales by order of court, sales by executors, administrators, guardians, and assignees, and to all sales for taxes. [44 v. 114.]

§§ 5410, 5411, apply to void and voidable titles, 2 N. P. 415

Mortgagee with express notice is not a *bona fide* purchaser without notice and not entitled to the protection afforded such *bona fide* purchasers by this section, 2 C. C. 27. Invalid sale of mortgaged property by reason of failure to serve defendant embraced by this section, 33 O. S. 270.

§ 5412. **Proceedings to vacate satisfaction of judgment.** When a plaintiff in execution, or his agent, has, in good faith, ordered a levy of execution upon property not subject thereto, and the same has been sold and applied on his judgment, and a recovery therefor has been had against him by the owner of the property, the person so recovered against, and having paid the amount so recovered, may, on motion in the court having control of the judgment, upon giving the judgment defendant notice of such motion, have the satisfaction, so made from the sale of the property on execution, vacated, and shall be entitled to collect the judgment. [48 v. 97, § 1; 11.]

14 O. S. 464.

§ 5413. **Relief of officer who levies upon and sells wrong property in good faith.** When an officer to whom an execution has been issued upon a judgment levies the execution, in good faith, upon property not subject thereto, and sells the same, and applies the proceeds in satisfaction, or part satisfaction, of the judgment, and a recovery is had against him for its value, the officer, upon payment of such value, and on motion before the court having control of the judgment, and a showing to the court that due notice of such motion has been given to the defendant named in the execution, may have the satisfaction of such judgment, so made from the sale of such property, vacated, and execution shall issue therefor, for the use of such officer, the same as if such levy and sale had not been made. [48 v. 97, § 2; S. & C. 1150.]

§ 5414. **Remedy when defendant or surety etc., pays for such property.** When a defendant in a judgment, or a surety or co-surety of such defendant, has, by mistake, directed an execution issued on the judgment to be levied on property not liable to such execution, and thereby caused such judgment to be wholly or in part satisfied, and has been compelled to pay the owner of such property therefor, he shall be adjudged to have the same rights against any co-defendant in such judgment, and against any co-surety or principal, in respect of the debts on which such judgment is founded, as though such satisfaction had, by due process of law, been made out of the property of such defendant, surety, or co-surety, so directing such levy. [48 v. 97, § 3; S. & C. 1151.]

§ 5415. **When judgment loses preference.** No judg-

ment, on which execution is not issued and levied before the expiration of one year next after its rendition, shall operate as a lien on the estate of a debtor to the prejudice of any other *bona fide* judgment creditor; but in all cases in which judgment is rendered in the circuit court or supreme court, and a special mandate is directed to the common pleas court to carry the same into execution, the lien of the judgment creditor shall continue for one year after the first day of the term of the common pleas court to which such mandate is directed, or, if the mandate be entered on the journal in vacation, after it is so entered; and in computing such period of one year, the time covered by an appeal of the case, or by an injunction against the execution, or by proceedings in error, or by a vacancy in the office of sheriff and coroner, or by the inability of such officers, shall be excluded. [82 v. 35; 65 v. 202, § 447; S. & S. 563.]

Levy must be made within a year after the rendition of a judgment to retain priority, 3 O. 135, 136, 366; 5 O. 398; 6 O. 30; 9 O. 142. A junior judgment levied within the year has a preferable lien to a senior judgment levied on same property after the year, 5 O. 398; 6 O. 30; 7 C. C. 285; and an order of court finding such senior judgment a lien and fixing the order of priority as to other, than existing liens, but not ordering the sale of such particular real estate for the satisfaction of such lien is not equivalent to levying an execution thereon within the year, *Id.* A levy made within the year and set aside after the expiration of the year loses its lien as against a subsequent judgment upon which a levy is made within the year and continued to the sale, 2 O. 65, 395; 8 O. 366; and when a judgment is modified, and a levy set aside at the same term, the lien of the judgment is not preserved by the provisions of § 5360, which applies only to modifications after the term, 24 O. S. 114. Judgments not levied within the year rank from the date of levy, 5 O. 398. The lien of a senior judgment which has not been levied within the year will not be defeated by a sale upon a junior mortgage made within the year from the decree of foreclosure, 16 O. 449. As between a senior judgment not levied within the year, an intervening mortgage, and a junior judgment levied within the year, the senior judgment has the first lien, the mortgage the second, and the junior judgment the last, 14 O. 318; 16 O. 533. A mortgage delivered for record on the first day of the term of court, and before court actually convenes, it has been held, will prevail against the lien of a judgment recovered at the same term, 16 O. 111, 534; but where the judges had, under a statute, fixed 10 o'clock A. M. as the hour for the commencement of the term, and their order was entered on the journal, it was held that the record was conclusive as to the hour when the term began, and that the lien of a judgment was superior to that of a mortgage delivered for record at 11 o'clock A. M., although the fact was that the court did not actually convene till afternoon, 17 O. S. 231; see 24 O. S. 150. A levy on other

property does not save lien on specific property, 3 O. 136, and a levy on property of principal does not save lien on that of surety, 3 O. 135. Section requires execution to be issued and levied, 11 C. C. 424; see 32 Bull 185.

§ 5416. New appraisalment for sale on execution. When real estate, taken on execution and appraised, and twice advertised and offered for sale, remains unsold for want of bidders, the court from which the execution issued shall, on motion of the plaintiff, set aside such appraisalment, and order a new appraisalment to be made, or set aside such levy and appraisalment, and award a new execution to issue, as the case may require; and when such real estate, or any part thereof, has been three times appraised as aforesaid, and thereafter twice advertised and offered for sale, and then remains unsold for want of bidders, the court may direct the amount for which the same shall be sold. [65 v. 202, § 447; S. & S. 563.]

When an assignee has commenced an action to sell the realty of the assignor as provided in § 6351, the provisions of this section apply to subsequent proceedings to sell under the decree therein made, 40 O. S. 330, 331. An order of sale in a proceeding to foreclose a mortgage is not an execution within the purview of § 5416; 6 C. C. 62. When premises are ordered to be sold in such a proceeding and have been three times appraised by order of the court and thereafter twice advertised and offered for sale and then remain unsold for want of bidders, the court is not empowered to direct the amount for which the same shall be sold, *Id.*

§ 5417. New appraisalment. Terms of sale of mortgaged premises. When premises are ordered to be sold, and, having been twice advertised and offered for sale, remain unsold for want of bidders, the court from which the order of sale issued shall, on motion of the plaintiff or defendant, order a new appraisalment, and may also order that the land be sold on time, as follows: One-third cash in hand, one-third in nine months from the day of sale, and the remaining third in eighteen months from the day of sale, the deferred payments to draw six per cent. interest, and to be secured by mortgage on the premises. [67 v. 114, § 374.]

§ 5418. When executions to be returned. The officer to whom a writ of execution is directed shall return such writ to the court to which it is returnable within sixty days from the date thereof. [51 v. 57, § 448; S. & C. 1083.]

And it is error for the court under the authority of which it is issued, without any return thereof, to order the same writ to

be extended; and a sale made on such extended writ after the expiration of the sixty days should be set aside, 2 C. C. R. 330. If such sale is confirmed, a reviewing court may set aside such sale and confirmation, *Id.*; but it was held that the failure of the sheriff to file in the clerk's office his return on an *alias* order of sale within sixty days from the date of issuing was not such an irregularity or neglect in the proceedings as would be regarded on error after a confirmation of sale thereunder, 1 C. C. R. 669. An amendment of the return may be made, but it must be made within a reasonable time, and rests in the sound discretion of the court, 4 O. 59. It can not, however, be amended so as to affect prior levies or liens, 13 O. 220; and if an amendment is made, the lien will only operate as to third persons from the date of amendment, *Id.* As between parties, privies, and the officer, except where the latter is charged upon its falsity, the return is matter of record and therefore conclusive, 4 O. 135, 137, and before it can be controverted there must be direct proceedings against the officer. No collateral impeachment is permitted, 2 D. 318, but the date of the return is not conclusive, 10 O. 8, 23, and a defect in the description in a levy may be supplied by parol evidence, 3 O. 272; 5 O. 522. On injunction to stay execution after a levy on chattels, the sheriff is bound to restore the chattels levied on to the owner, 3 O. 449.

§ 5419. How judgment against principal and surety entered. When judgment is rendered in a court of record within this state, upon an instrument of writing in which two or more persons are jointly or severally bound, and it is made to appear to the court, by parol or other testimony, that one or more of the persons so bound signed the same as surety or bail for his or their co-defendant, the clerk of such court, in recording the judgment thereon, shall certify which of the defendants is principal debtor, and which surety or bail; the clerk shall issue execution on such judgment, commanding the officer to cause the money to be made of the goods and chattels, lands and tenements, of the principal debtor, or, for want of sufficient property of the principal debtor to make the same, that he cause the same to be made of the goods and chattels, lands and tenements, of the surety or bail; and the property, both personal and real, of the principal debtor, within the jurisdiction of the court, shall be exhausted before any of the property of the surety or bail shall be taken in execution. [51 v. 57, § 449; S. & C. 1083.]

The consent of parties to a judgment in open court at the time it is rendered, that one or more of the defendants may be certified as sureties, is sufficient, 36 O. S. 155. The omission to make the certificate, 11 O. 310, or refusal of the court to make it, 3 Bull 547 (but see *obiter* 11 O. 310), can not be corrected by a proceeding in error. If sureties neglect, when judgment is ren-

dered, to cause the entry to be made, chancery will not compel the judgment creditor to first exhaust the property of the principal, 16 O. 27. Yet if, with a knowledge of the suretyship, the judgment creditor levies upon unincumbered land of the principal debtor, and afterwards abandons the levy without the consent of the surety, the surety will be discharged to the extent of the value of the land released from the levy, 40 O. S. 446. Such finding by the court and certificate in the judgment showing who are principals and who are sureties do not conclude the parties in a subsequent action for contribution; and the effect of such finding and certificate is not changed by the fact that the defendants appeared at the trial and filed answers, in which each alleged that the others were principal debtors, 25 O. S. 89. Where the holder of a joint and several obligation elects to sue one of the obligors who is only a surety thereon, it is not competent for the defendant, by cross-petition or otherwise, to bring in his principal for the purpose of having the relation of principal and surety certified under this section, although the holder knew that such relation existed, 81 O. S. 565. Refusal of court to grant motion of defendant asking that it be certified that one of the defendants was principal and the other surety, is not subject to review on error, 3 Bull 547.

§ 5420. Appraisers' fees. Penalty for neglecting to serve as appraiser. Each appraiser of real estate under the provisions of this chapter shall receive fifty cents per day for his services, to be collected on the execution by virtue of which the property appraised was levied on; and when any freeholder, summoned as an appraiser, fails to appear at the time and place appointed by the officer, and discharge his duty as appraiser, he shall, on complaint made to a justice of the peace of the township in which he resides, forfeit and pay the sum of fifty cents for every such neglect, unless he render a reasonable excuse, which shall be collected by the justice, and paid into the township treasury, for the use of the township. [51 v. 57, § 450; S. & C. 1084.]

§ 5421. Execution issued to another county may be returned by mail. When execution is issued in any county, and directed to the sheriff or coroner of another county, the sheriff or coroner having the execution may, after having discharged all the duties required of him by law, transmit such execution, by mail, to the clerk of the court who issued it; and on proof made by such sheriff or coroner that the execution was mailed soon enough to have reached the office where it was issued within the time prescribed by law, he shall not be liable for any amercement or penalty if it does not reach the office in due time. [51 v. 57, § 454; S. & C. 1086.]

§ 5422. Money not to be forwarded by mail, unless, etc.

No sheriff or coroner shall forward by mail any money made on such execution, unless he be specially instructed to do so by the plaintiff, his agent, or attorney of record. [64 v. 64, § 455; S. & S. 565.]

§ 5423. **Execution docket.** The clerk of the court of common pleas shall enter upon the execution docket the names, in full, of the parties to the cause in which an execution is issued, the number of the cause upon the appearance docket, the number of the execution, the date of its issue, the amount of the judgment, the costs due each person or officer, the time when the judgment was rendered, and the date of the return; and the return shall be recorded [therein] in full. [75 v. 690, § 51.]

§ 5424. **Index to execution docket.** The clerk shall keep an index to the execution docket, showing, in separate columns, the names of all parties against whom and in whose favor an execution has been issued, the number of the execution, and the number of the cause upon the appearance docket. [34 v. 45, § 2; S. & C. 1280.]

See § 5339.

§ 5425. **Proceedings when order of sale issued in case not on trial docket.** When an order of sale is issued in a case not on the trial docket, the clerk shall enter it on the execution docket, and enter the subsequent proceedings had in pursuance thereof, in the same manner that executions and proceedings thereon are entered; when a sale of real estate is made in pursuance of such order, it shall be confirmed in all respects as sales on executions are confirmed; and after the sale the officer shall be governed in all respects by the law relating to sales on execution. [55 v. 26, § 306; S. & C. 1034.]

Under this section, the effect of a decree in foreclosure is not affected by its having been left off of the trial docket, 35 O. S. 432.

SUBDIVISION III. EXEMPTION FROM EXECUTION.

§ 5426. **Property of unmarried women exempt from execution.** Every unmarried woman may hold the following property exempt from execution, attachment, or sale, to satisfy any judgment or order, to wit:

1. Wearing apparel, to be selected by her, not exceeding in value one hundred dollars.
2. One sewing-machine.

3. One knitting-machine.

4. A bible, hymn-book, psalm-book, and any other books not exceeding in value twenty-five dollars. [71 v. 59, § 1.]

§ 5427. **Beneficiary funds exempt.** Any beneficiary fund, not exceeding five thousand dollars, set apart, appropriated, or paid, by any benevolent association or society, according to its rules, regulations, or by-laws, to the family of any deceased member, or to any member of such family, shall not be liable to be taken by any process or proceedings, legal or equitable, to pay any debt of such deceased member. [71 v. 76, § 1.]

§ 5428. **Certain property of benevolent societies exempt.** The regalia, insignia of office, journals of proceedings, account-books, and the private work, belonging to any benevolent society in this state, shall be exempt from seizure or sale to satisfy any judgment or decree hereafter rendered against such society. [76 v. 135, § 1.]

§ 5429. **Property kept and used to extinguish fires exempt.** All property used, or kept to be used, by any municipal corporation or fire company, for the purpose of extinguishing fire, shall be exempt from execution and sale to satisfy any judgment or order arising upon contract or otherwise; but the owner thereof may create valid liens thereon by bill of sale or mortgage. [56 v. 36, § 1; S. & C. 1147.]

§ 5430. **Exemptions to heads of families and widows.** Every person who has a family, and every widow, may hold the following property exempt from execution, attachment, or sale, for any debt, damages, fine, or amercement, to wit:

1. The wearing apparel of such person or family; the beds, bedsteads, and bedding necessary for the use of the same; one cooking-stove and pipe; one stove and pipe used for warming the dwelling; and fuel sufficient for the period of sixty days, actually provided and designed for the use of such person or family.

2. One cow, or if the debtor owns no cow, household furniture, to be selected by him or her, not exceeding thirty-five dollars in value; two swine, or the pork therefrom, or if the debtor owns no swine, household furniture, to be selected by him or her, not exceeding fifteen dollars in value; six sheep, the wool shorn from them, and the cloth or other articles manufactured therefrom, or, in

lieu thereof, household furniture, to be selected by the debtor, not exceeding fifteen dollars in value; and sufficient food for such animals for the period of sixty days.

3. The bibles, hymn-books, psalm-books, testaments, and school-books used in the family, and all family pictures.

4. Provision actually provided and designed for the use of such person or family, not exceeding fifty dollars in value, to be selected by the debtor; and other articles of household and kitchen furniture, or either, necessary for such person or family, to be selected by the debtor, not exceeding fifty dollars in value.

5. One sewing-machine; one knitting-machine; and the tools and implements of the debtor necessary for carrying on his or her trade or business, whether mechanical or agricultural, to be selected by him or her, not exceeding one hundred dollars in value.

6. The personal earnings of the debtor, and the personal earnings of his or her minor child or children, for three months, when it is made to appear, by the affidavit of the debtor, or otherwise, that such earnings are necessary to the support of such debtor, or of his or her family; and such period of three months shall date from the time of issuing any attachment or other process, the rendition of any judgment, or the making of any order, under which the attempt may be made to subject such earnings to the payment of a debt.

7. All articles, specimens, and cabinets of natural history or science, whether animal, vegetable, or mineral, except such as may be kept or intended for show or exhibition for money or pecuniary gain. [70 v. 132; § 1.]

Non-residents may claim exemptions under this section, 26 O. S. 577.

3. Family pictures, 2 A. L. Reg. 489.

4. Provisions, see 2 W. L. M. 585; 2 W. L. J. 402.

6. Earnings for three months, 25 O. S. 516 (§ 5483), but not exempt when husband does not live with or support family, 1 Clev. Rep. 140. A citizen of this state may be enjoined from prosecuting an attachment in another state against a citizen of this state to subject to the payment of his claim the earnings of the debtor which by the laws of this state are exempt from being applied to the payment of such claim, 25 O. S. 516. A debtor residing with his widowed mother and invalid brother who are supported by him, is not entitled under this or § 5483 as the head of a family to hold exempt from execution or attachment his personal earnings for three months, 49 O. S. 651. See 10 C. C. 865.

§ 5431. Special exemptions to physicians, draymen, etc. Every person who is the head of a family, and engaged in the business of draying for a livelihood, shall, in addition to the exemptions specified in the preceding section, hold one horse, harness, and dray exempt from execution; every head of a family who is engaged in the business of agriculture shall, in addition to the exemptions provided for in the preceding section, hold exempt from execution one horse, or one yoke of cattle, with the necessary gearing for the same, and one wagon; and every head of a family who is engaged in the practice of medicine shall, in addition to the exemptions specified in said section, hold one horse, one saddle and bridle, and also books, medicines, and instruments, pertaining to his profession, not exceeding one hundred dollars in value, exempt from execution. [70 v. 132, § 2.]

A person residing in a village, and cultivating in corn, potatoes, cabbage, beans, etc., two town lots containing less than half an acre of land, is not one "engaged in the business of agriculture" within the meaning of this section, 4 Bull 540; 8 Rec. 15. A "buggy" is not included in the term "wagon," *Id.* A horse of any value is exempt for agriculture, 8 W. L. J. 569.

§ 5432. Appraisal of exempted property. In all cases where it is necessary to ascertain the amount or value of personal property exempt under this subdivision, it shall be estimated and appraised by two disinterested householders of the county, to be selected by the officer holding the execution, and by him sworn to impartially make such appraisement. [70 v. 132, § 3; 70 v. 51, § 3.]

§ 5433. Provisions with respect to exemptions to apply to all courts. The provisions contained in this subdivision with respect to exemptions shall apply to all courts in this state, including justices of the peace and mayors' courts, so that a person shall be entitled to all the exemptions in any case or proceeding, or before any court or officer, that he may be entitled to in any other case or proceeding, or before any other court or officer. [75 v. 692, § 61.]

See 10 C. C. 355.

§ 5434. When subsequent sections do not apply. The subsequent sections of this subdivision shall not extend to a judgment rendered on a mortgage executed by a debtor and his wife, nor to a claim for manual work or labor, less than one hundred dollars, nor to impair the lien by mortgage or otherwise, of the vendor for the pur-

chase money of the premises in question, nor the lien of a mechanic, or other person, under any statute of this state, for materials furnished or labor performed in the erection of the dwelling-house thereon, nor for the payment of taxes due thereon. [82 v. 219; 48 v. 29, § 7.]

Claim for work and labor, 5 Bull 815; cited in 2 C. C. 66.

No exemption in case of judgments under liquor laws in consequence of unlawful sales, except under § 5430; see § 4363; against judgment under gaming laws, § 4275; nor for taxes and penalties under "Dow Liquor Law," 83 v. 158, § 4. When husband and wife have executed a mortgage and a judgment is afterwards recovered against the husband, the judgment creditor can not have the property sold against the wishes of the mortgagee for the payment of the mortgage as well as the judgment and thus prevent the allowance of a homestead, 6 C. C. 487.

§ 5435. When husband and wife entitled to homestead; widow; widower. Husband and wife living together, a widow, or a widower living with an unmarried daughter or unmarried minor son, may hold exempt from sale, on judgment or order, a family homestead not exceeding one thousand dollars in value; and the husband, or, in case of his failure or refusal, the wife, shall have the right to make the demand therefor; but neither can make such demand if the other has a homestead. [66 v. 48, § 1; 68 v. 106, § 4.]

Husband and wife can not both have a homestead exemption, 23 O. S. 603; 3 Bull 296; but when homestead property is held by them in common, the husband is not precluded from claiming an exemption therein, 11 Bull 65. A wife is entitled to a homestead in husband's mortgaged property, she not having joined in the mortgage, 8 Rec. 411; 1 C. C. R. 41; § 5442; but not to a homestead in mortgage before marriage, 29 O. S. 636; nor in mortgage of non-homestead land, 29 O. S. 523.

A *widow* is entitled to homestead in addition to dower, 2 W. L. M. 426; 39 O. S. 365; see § 5443. She is entitled to a homestead, though not living with an "unmarried daughter or unmarried minor son," 39 O. S. 336; but she is not entitled to a homestead in lands of her deceased husband under this section, 29 O. S. 569.

A *widower* with no other family than an unmarried daughter, though she is over the age of minority, may claim the benefit of the exemption, 9 Bull 337.

Miscellaneous. A homestead may be acquired by occupation at any time before levy, 41 O. S. 180. It may be lost by neglect or refusal to claim it, or by abandonment, 24 O. S. 438; 32 O. S. 443; 42 O. S. 139. It is not lost by leasing the property, 12 O. S. 431; nor defeated by a fraudulent conveyance when set aside, 41 O. S. 206, citing 14 O. S. 298; 28 O. S. 61; see 2 Clev. R. 9; 42 O. S. 165. The proper time for the assertion of the debtor's claim is when

the officer is about to execute the writ of execution or order of sale, 14 O. S. 298. The right to a homestead is a personal privilege and can not be conveyed to another, 42 O. S. 139. The amount of the homestead exemption is to be determined by the law in force when the debt was contracted, 1 C. C. R. 41; see 4 W. L. M. 149. A homestead is subject to judgment or execution lien before and after the same is demanded and set off to the debtor, 42 O. S. 139, 165. A wife's separate property is not husband's homestead, 20 O. S. 473; her general property may be, 2 W. L. M. 327. A tenancy for one year is not a homestead, 15 O. S. 279; nor is land purchased and not paid for, 2 W. L. M. 585. Homestead can not be allowed on partition, 5 W. L. M. 25; 8 Rec. 654; can only be claimed as against creditors, 8 Rec. 654; not allowed in action against watercraft, 27 O. S. 517. Proceedings against must be before court issuing process, 12 O. S. 431. The husband is entitled to claim homestead exemption notwithstanding his wife owns property, if he has removed his family from the house and lot of his wife and no longer occupies it as a homestead, 40 O. S. 232. A judgment lien which has attached does not become lost or removed from that part of the real estate thereafter set off as a family homestead by the assignment and use of such homestead, 42 O. S. 139. When the rights of a homestead are removed as by a conveyance, liens on such property may be enforced by due process of law, *Id.* Where it appears that the wife is living apart from her husband, the burden of proof is upon her to establish the fact that such absence is merely temporary with intention of returning, 43 O. S. 207. This section must be read as though § 79 was appended to it as a saving clause, 1 C. C. 41. Life estate, 50 O. S. 719; 7 C. C. 86.

§ 5436. Preceding section applies to owner of superstructures and lessees. A person owning the superstructure of a dwelling-house occupied by him or her as a family homestead, although the title to the land upon which the same is built is in another, and also lessees, shall be entitled to the benefit of the preceding section, in the same manner as the owner of the freehold or inheritance; but this section shall not be construed to prevent a sale of the fee simple, subject to the lease. [48 v. 29, § 5; S. & C. 1145.]

A tenancy of a house, stable, and parcel of land, for a single year, where the debtor does not claim the same as a homestead, is not an ownership of a homestead, within the meaning of this section, so as to deprive the holder of the benefit of the exemption of personality from execution in lieu of homestead under § 5441; 15 O. S. 279; see 8 C. C. 39.

§ 5437. Homestead for decedent's family. On petition of executors or administrators to sell, to pay debts, the lands of a decedent who has left a widow, or a minor child, unmarried, and composing part of the decedent's family at the time of his death, the appraisers shall proceed to set apart a homestead as provided in the next section, and the same shall, except as otherwise provided in section 6155 of the Re-

vised Statutes, remain exempt from sale on execution, and exempt from sale under any order of the court so long as the widow, if she remain unmarried, or any unmarried minor child of said decedent resides thereon; provided, that in all cases where the homestead has been or shall be sold to pay any lien which precludes the allowance of a homestead, the residue of the proceeds, not exceeding five hundred dollars, shall be paid to the widow, or in case there be no widow, to the minor child, unmarried, in lieu of a homestead, on her or said minor child's application, in person, or by agent, attorney or guardian. [91 v. 307.]

A homestead having been assigned by metes and bounds, under the act of 1850, § 5435 *et seq.*, to the widow and unmarried minor children of a decedent, in a proceeding in the probate court by an executor to sell lands to pay debts, orders of such court in the proceeding, directing and confirming a sale of the real estate so assigned, subject to the homestead, and while the same is occupied as such homestead, are not merely voidable, but void, 39 O. S. 365. Under a previous statute, after all the children of the intestate arrived at full age, the widow was held not to be entitled longer to hold a homestead previously set off to her, and the lands were, on petition of the administrator, allowed to be sold to pay the debts of the estate, 29 O. S. 569. Where a widow was allowed five hundred dollars in lieu of homestead, on sale by administrator, this was held not error to the prejudice of the administrator and creditors, no application having been made to set off the homestead, and the court still having control of the fund, 6 Bull 636. A widow whose husband was not the owner of a homestead is not entitled to an allowance in lieu of a homestead out of his estate, 3 C. C. 488. §§ 5437 and 5438 make no provision for election by widow to have the homestead sold, and have allowed to her in lieu thereof \$500 in money out of the proceeds of the sale, 6 C. C. 208; *Quære* whether this section should be amended, 25 Bull 182.

§ 5438. **How homestead set off.** Either party may complain of assignment. The officer executing any writ of execution founded on a judgment or order shall, on application of the debtor, his wife, agent, or attorney, at any time before sale, if such debtor has a family, and if the lands or tenements about to be levied upon (1), or any part or parcel thereof, constitute the homestead thereof, cause the inquest of appraisers, upon their oaths, to set off to such debtor, by metes and bounds, a homestead not exceeding one thousand dollars in value; such assignment of the homestead shall be returned by the officer along with the writ, and shall be copied by the clerk into the execution docket; and if no complaint be made

by either party, no further proceedings shall be had against the homestead; but the remainder of the debtor's lands and tenements, if any there be, shall be liable to sale on execution; upon complaint of either party, and upon good cause shown, the court out of which the writ issued may order a re-appraisement and re-assignment of the homestead; but if no application be made during the lifetime of the debtor, it may be made by the widow of the judgment debtor at any time before a sale. [66 v. 48, ‡ 2.]

In October, 1877, the judgment of W. against K. became a lien upon K.'s real estate. In June, 1878, K. occupied said property as a family homestead. Held that under an order for sale issued in January, 1879, K. was entitled to an assignment of a homestead in such property, 41 O. S. 186. A married woman with a family may apply successfully for the assignment of a homestead after judgment but before levy, if her husband has no homestead and the property is occupied by her as a family homestead before the levy, or before an order of sale was issued, and this is true even where the property is an undivided interest which has after the judgment but before the levy or issue of order of sale been set off to her in severalty by consent of co-tenants, 46 O. S. 183. Will not prevent judgment from becoming dormant, 51 O. S. 230.

‡ 5439. Procedure when homestead not divisible. When the homestead of a debtor in execution consists of a house and a lot of land which, in the opinion of the appraisers, will not bear division without manifest injury and inconvenience, the plaintiff in execution shall receive, in lieu of the proceeds of a sale of the homestead, the amount over and above one hundred dollars, annually, adjudged by the appraisers as a fair and reasonable rent for the same, until the debt, costs, and interest are paid; the rent, over and above one hundred dollars, shall be payable in quarterly payments, commencing three months from the time of the levy of the execution, and may be paid to the plaintiff in execution, or to his assigns, or to the clerk of the court of common pleas of the county in which the homestead is situate, and the clerk shall give to the person paying the same a proper receipt, and enter the same on the execution docket without charge; if the rent be not paid quarterly, as above provided, or within ten days after each and every payment becomes due, the officer shall proceed and sell the homestead, in the same manner as is provided in other cases for the sale of real estate, but it shall not be sold for less than its appraised value; the plaintiff in execution, the judgment debtor, or any other person to whom,

under any law of this state, such homestead has been set off, may cause the homestead to be re-appraised once in two years, in the same manner as provided for in the preceding section, and the rent shall, after such re-appraisalment, be paid in accordance therewith; and if such re-appraisalment be made at the instance of the plaintiff in execution, and the appraisalment be not increased one hundred dollars over the amount of the next previous appraisalment, the costs thereof shall be paid by the plaintiff in execution; but in all other cases the costs of the re-appraisalment shall be taxed as costs in the original case. [75 v. 43, § 6.]

Rent on indivisible homestead begins at date of order of sale,
7 Rec. 605

§ 5440. Allowance in lieu of homestead, and of proceeds of sale thereof. When a homestead is charged with liens, some of which, as against the head of the family, or the wife, preclude the allowance of a homestead to either of them, and others of such liens do not preclude such allowance, and a sale of such homestead is had, then, after the payment, out of the proceeds of such sale, of the liens so precluding such allowance, the balance, not exceeding five hundred dollars, shall be awarded to the head of the family, or the wife, as the case may be, in lieu of such homestead, upon his or her application, in person, or by agent or attorney. [66 v. 48, § 4.]

The balance, not exceeding five hundred dollars, shall be awarded to the head of the family, 26 O. S. 471; 32 O. S. 443; see 43 O. S. 63, or the wife on her application, 31 O. S. 437, though the land has been fraudulently conveyed, 42 O. S. 165; 41 O. S. 206; but neither the husband nor the wife is entitled to an allowance out of the proceeds as against a debt which both attempted to secure by mortgage upon such homestead, duly executed, acknowledged, and recorded, the legal validity of such mortgage being defeated by a mutual mistake in the description of the premises, 2 C. C. R. 27; and when the wife is living apart from her husband, under a judicial decree allowing her alimony, she is not entitled to the allowance, 13 Bull 637; and if the debtor voluntarily abandons his homestead before claiming it as exempt, 32 O. S. 443, or before the surplus fund is disposed of by the court, 24 O. S. 488, his right to such exemption is forfeited; but where the property was destroyed by fire before sale, and the debtor removed from it, though with no intention to rebuild, it was held, under the circumstances of the case, that there was no such abandonment as precluded the right to claim the exemption, and that out of the surplus, after payment of the preferred liens, upon the application of the debtor's wife, an allowance to her might be made in lieu of the homestead, 31 O. S. 437. This section does not apply to debts contracted before its passage; but, independently of it, the debtor's right to the exemption attaches to the surplus of the proceeds of such sale as against creditors

whose claims do not preclude the allowance of a homestead, Id. The right to a homestead is fixed when the fund is disposed of, 24 O. S. 488; 40 Id. 345; see 2 C. C. R. 63, and § 5441n.

There is no presumption of law that a judgment debtor will claim to hold any particular item of personal property as exempt from execution, 38 O. S. 416. A homestead is subject to a judgment or execution lien both before and after the same is demanded and set off to the debtor, 42 O. S. 165. The question of precedence of other liens, and the claim of the debtor in lieu of homestead must be adjudicated by the court, Id. Exemption in lieu of homestead must be demanded before money is paid over to judgment creditor, 7 Bull 131. In an action to marshal liens where there are liens of both classes referred to in this section, the proper practice is to adjudicate as to both of the liens before the sale and not simply as to the one as against which the homestead claim could be asserted, so that if it is necessary, the property may be sold without the assignment of a homestead therein, 2 C. C. 63. It seems that the question as to the allowance in lieu of a homestead as against a lien which does not preclude such allowance is to be determined as of the time of the distribution of the fund, Id.; 1 N. P. 58. In proceeding by executor to sell land to pay debts widow can not under this section have allowed to her out of proceeds of sale \$500 in money in lieu of homestead, 6 C. C. 203. The sale under this section must be a sale upon a mortgage which precludes the allowance of a homestead and not simply a sale upon a judgment at the instance of the judgment creditor as against whom a homestead may be allowed, 6 C. C. 489.

§ 5441. Five hundred dollars' worth of property exempt in certain cases. Husband and wife living together, a widower living with an unmarried daughter or minor son, every widow, and every unmarried female having in good faith the care, maintenance and custody of any minor child or children of a deceased relative, residents of Ohio, and not the owner of a homestead, may, in lieu thereof, hold exempt from levy and sale real or personal property to be selected by such person, his agent or attorney, at any time before sale not exceeding five hundred dollars (\$500) in value, in addition to the amount of chattel property otherwise by law exempted. [81 v. 148; 70 v. 51, § 3; 66 v. 50.]

"Husband and wife living together." But a wife living apart from her husband, under judicial decree allowing her alimony, is not entitled to the exemption, 13 Bull 637; and when real estate occupied as a family homestead is owned either by husband or wife, neither can hold exempt from execution the personal property allowed by this section in lieu of homestead, 23 O. S. 603; but where the execution debtor's wife owns land which is their homestead, but before the levy upon goods they have removed from it, and it is not then their homestead, the debtor may claim exemption of personal property in lieu of homestead, 40 O. S. 232; absconding of husband, effect, 8 C. C. 278.

"Widow," "widower," etc. In a proceeding by an executor to sell land to pay debts of decedent this section does not

authorize the widow to demand and have set off to her in lieu of homestead real property, not exceeding \$500 in value, 6 C. C. 203. See § 5435n.

"Residents of Ohio." The section formerly provided that: "It shall be lawful for any resident of Ohio, being the head of a family and not the owner of a homestead," etc. (66 v. 50); see 9 O. S. 425. Under this amendment, it was held that the members of an insolvent firm were not entitled to the statutory exemptions out of the partnership property after it had been seized in execution by partnership creditors, notwithstanding all the members joined in demanding the exemptions, 26 O. S. 317, but that after the dissolution and sale of the interest of one member to the other the latter might hold such property exempt from the payment of a debt thereafter asserted against him on the ground that such debt was a partnership debt due at the time of the dissolution, 38 O. S. 401, and see 1 C. S. C. R. 404; 3 Bull 788; 4 Id. 986.

"Not the owner of a homestead," 40 O. S. 232; 43 O. S. 63 (equity of redemption subjected by creditor); see 3 C. C. R. 488. Though the property is mortgaged for more than its value, the benefit of the exemption can not be claimed, as the debtor is still the owner, 41 O. S. 377; 50 O. S. 719. A resident of Ohio who is the head of a family and whose wife is not the owner of a homestead may in lieu thereof hold exempt from attachment personal property to an amount not exceeding \$500 including personal earnings in excess of \$150 exempt under § 6489, 7 C. C. 51. See 8 Id. 35; 2 N. P. 390.

"Exempt from levy and sale." Marriage of the debtor subsequent to levy and before sale does not entitle the debtor to the benefit of the exemption, 40 O. S. 345, 346; 2 C. C. R. 63, see 41 O. S. 180; 8 C. C. 139.

"Personal property," includes credits and moneys selected by the debtor. Credits and moneys selected by the debtor can not be taken and held under an order of attachment or by garnishee process, 36 O. S. 545; see 25 O. S. 320.

"To be selected." Personal property is exempt only when selected. Until selection it is subject to levy and sale, 38 O. S. 416. There is no presumption of law that a judgment debtor has selected or will claim to hold any particular item of personal property as exempt from execution in lieu of a homestead, although he may not own any other property from which selections might be made, Id. The right may be waived, as where the debtor fixed a time and place for meeting the officer and making the selection, and purposely failed to attend, 29 O. S. 667; but where property had been levied on by attachment, and, pending the suit, the debtor assigned all his property for the benefit of creditors, except such as he might lawfully hold exempt from execution, it was held that the right of the debtor to select the attached property as exempt from sale was not thereby waived, 38 O. S. 530. Concealment of other property does not prevent the right to select, 2 Clev. R. 129. The original section 8, act 1850, did not contain the clause "to be selected," etc. That clause was added by the amendment of 1858; see 9 O. S. 590. By the act of 1869 the right to make the selection was extended to the debtor's agent or attorney, and by the act of 1873 (70 v. 51) the word "wife" was inserted, but under the

previous amendment (66 v. 48, 50) it was held that if the husband owned but a single article of personal property, and it was of less value than \$500, and was levied upon to satisfy his debt, his wife was entitled to demand and have such article set off in lieu of homestead, 28 O. S. 483; but it has been held that she can not select as exempt from execution chattels upon which her husband has given a mortgage to secure the judgment creditor for the debt on which the judgment is founded, 17 Bull 318; see 3 O. S. 270, holding that in case of a pledge or chattel mortgage the owner waives the benefit of exemption so far as the incumbrance extends.

"*At any time before sale.*" 4 Bull 986; see 10 Rec. 570; 2 Bull 127. The section applies as well to property levied on by attachment as by execution, and an order for the sale of the attached property made in the proceeding in attachment does not prevent the debtor from exercising his right of selection after the making of such order of sale, 38 O. S. 530. Formerly the demand was to be made at the time of the levy, 4 W. L. M. 149; 3 O. S. 270; but if the debtor were not present, it should be made, and notice given to the officer within a reasonable time before sale, 3 O. S. 270; but where lands were sold in an action on a mortgage executed by husband and wife, neither of whom had a homestead, the wife, as against a judgment creditor who was a party, was held entitled to the exemption out of the surplus after satisfaction of the mortgage debt, though no demand was made until the sale was confirmed and the money in the hands of the officer for distribution, 31 O. S. 447. By the amendment (70 v. 51) the value of the property was to be appraised by householders selected by the officer, and it was held that as the statute made no provision for appeal or review, unless fraud or collusion was charged, the appraisal was conclusive between the parties, 3 Bull 569.

"*In addition to the amount of chattel property otherwise by law exempted.*" Ownership of personal property does not prevent allowance, 2 Bull 127. Probate court can allow \$500 in lieu of homestead to assignor, 40 O. S. 631.

Special exemptions: Notary public's seal and register, § 113; debtor's burial lot in cemetery, § 1469; cemetery lands § 3578; certain property of railroad companies, § 8299.

Miscellaneous. A mortgage of premises, no part of which constitutes the family homestead of the mortgage debtor at the time of the execution and delivery of the mortgage, although not executed by the wife is not affected by the subsequent selection and occupancy of the premises mortgaged as the homestead of the mortgagor. Wife can not claim homestead, 29 O. S. 523. The right to demand the homestead exemption is confined to the person. Garnishee can not defend by demanding it for him, 25 O. S. 320. A tenant in common of property partitioned, may claim his exemption out of the proceeds of sale, 22 O. S. 616. In a sale on foreclosure of mortgaged premises the wife having joined in the execution of one mortgage but not of the other, the controversy as to the wife's homestead is an equitable one in which there is no right of trial by jury, and therefore a right of appeal, 34 O. S. 42. It has been repeatedly held that where a debtor is entitled to hold a judgment as property

exempt from execution, the object of the law being not to exonerate the debtor from the payment of his debt, but to protect his family, a set-off as to such judgment will not be ordered, 37 O. S. 477. M. does not lose his right to hold his goods exempt, although it appeared that the wife of M. owned a house and lot which had been occupied as a family homestead, but from which M. and his family had removed before levy, 40 O. S. 232. The right to demand an allowance in lieu of a homestead under this section is to be determined by the state of facts at the time the surplus arising from the sale is finally disposed of by the court, 43 O. S. 64.

§ 5442. **Homestead in property mortgaged by husband.** No sale of real estate made under a mortgage which is not executed by the wife of the debtor, if he has a wife, shall in any manner affect the right of the debtor's wife or family to have a homestead set off under the provisions of this subdivision. [48 v. 29, § 9; S. & C. 1147.]

See § 5435*n*. Where a man executes a mortgage and afterwards marries and becomes the head of a family, a family homestead in the mortgaged property is subject to the mortgage and in an action against the mortgagor or to foreclose such mortgage, his wife is not a necessary party, 29 O. S. 636.

§ 5443. **Dower not affected.** Nothing in this subdivision contained shall be so construed as in any way to impair the right of dower, or the mode provided by law for enforcing that right. [48 v. 29, § 10; S. & C. 1147.]

SUBDIVISION IV. WHEN CHATTELS CLAIMED BY THIRD PERSON.

§ 5444. **Proceedings when goods levied on are claimed by third person.** If the officer, by virtue of a writ of execution issued from any court of record of this state, levy such execution on goods and chattels claimed by a person other than the defendant, such officer shall forthwith give notice, in writing, to a justice of the peace of the county, in which shall be set forth the names of the plaintiff and defendant, together with the name of the claimant, and at the same time furnish the justice a schedule of the property claimed; the justice shall, immediately upon the receipt of the notice and schedule, make an entry of the same upon his docket, and issue a summons, directed to the sheriff, or any constable of the county, commanding him to summon five disinterested men, having the qualifications of an elector, who shall be named in the summons, to appear before him, at the time and place therein mentioned, which time shall not

be more than three days after the date of the writ, to try and determine the right of the claimant to the property in controversy; the claimant shall give two days' notice, in writing, to the plaintiff, or other party for whose benefit the execution was issued and levied, his agent or attorney, if within the county, of the time and place of trial; and he shall, moreover, prove to the satisfaction of the justice that such notice was given, or that it could not be given by reason of the absence of the party, his agent or attorney. [51 v. 57, 2 426; S. & C. 1070.]

The officer can not institute this proceeding, 16 O. S. 420, though it is designed mainly for his protection, 8 O. S. 370; 11 O. S. 527, 682. The claimant is not bound to proceed under the statute; he may sue the officer, 8 O. S. 370, but he must elect between replevin and a suit for damages, 2 H. 36. If he fails on the trial, he can not sue the officer, 8 O. S. 370, but if he succeeds he can, 4 O. S. 598. By resorting to this remedy the claimant waives constitutional objections, 12 O. S. 105. The finding on the trial is not conclusive, except to protect the officer, 11 O. S. 527. A sale by a constable of the property pending trial will not oust jurisdiction of justice, and the cause may proceed though not terminated until after sale, 11 O. S. 682. A jury of five is constitutional, 16 O. S. 420. The provisions of this subdivision do not apply to seizures by constables on executions issued by justices of the peace, 11 O. S. 527. Promise of stranger to indemnify officer against loss from leaving chattels in his possession and to pay to the officers their value if found to be the property of execution debtor not void as against public policy. Such promise is original and not within the statute of frauds, 3 C. C. 257.

2 5445. *Id.* Trial of the right of property. The jurors, summoned as aforesaid, shall be sworn to try and determine the right of the claimant to the property in controversy, and a true verdict to give according to the evidence; if the jury find that the right to the goods and chattels, or any part thereof, is in the claimant, they shall also find the value thereof, and the justice shall render judgment upon such finding for the claimant, that he recover his costs against the plaintiff in execution, or other party for whose benefit the execution issued, and also that he have restitution of the goods and chattels, or any part thereof, according to the finding of the jury; but if the jury find that the right to the goods and chattels, and every part thereof, is not in the claimant, the justice shall render judgment on such finding in favor of the plaintiff in execution, or other party for whose benefit the execution issued, and against the claim-

ant, for costs, and award execution thereon; if the jury fail to agree, and be discharged, costs shall be taxed, to abide the final event of the proceeding before the justice, and another jury shall be summoned in like manner as before; a judgment for the claimant, unless an undertaking be executed, as provided in the next section, shall be a justification of the officer in returning "no goods" to the writ of execution by virtue of which the levy was made, as to such part of the goods and chattels as were found to belong to the claimant; and the same fees shall be allowed and taxed by the justice, for himself, officers, jurors, and witnesses, as are allowed by law for like services in other cases. [57 v. 31, § 427; S. & C. 1071.]

§ 5446. *Proceedings when jury find for plaintiff.* If the jury find that the property, or any part thereof, is in the claimant, and the plaintiff in execution, at any time within three days after the trial, tender to the officer having the property in his custody on execution an undertaking, in double the amount of the value of the property as assessed by the jury, with good and sufficient sureties, payable to the claimant, to the effect that they will pay all damages sustained by reason of the detention or sale of the property, the officer shall deliver such undertaking to the claimant, and proceed to sell the property as if no trial of the right thereto had taken place, and shall not be liable to the claimant therefor. [51 v. 57, § 428; S. & C. 1071.]

A sheriff is not liable to the successful claimant for selling the chattels on the writ when the plaintiff in execution had tendered a bond as provided for in this section, and the claimant refused to receive it, 12 O. S. 105.

SUBDIVISION V. EXECUTION AGAINST THE PERSON.

§ 5447. *Requisites of execution against the person.* An execution against the person of the judgment debtor shall require the officer to arrest such debtor, and commit him to the jail of the county until he pays the judgment, or is discharged according to law. [51 v. 57, § 477; S. & C. 1091.]

A sheriff can not be amerced for not executing a writ under this section from another county, unless the indorsement "funds deposited" is made upon the writ; nor can a tender of his fees be substituted in the place of such indorsement, 10 O. 46, because the clerk of the county whence the writ issued was required to indorse upon it "funds are deposited to pay the sheriff on this

writ," and subscribe his name thereto, 29 v. 226. The imprisonment of a judgment debtor upon execution operates as a satisfaction of the judgment so long as the imprisonment continues, and so if he is discharged from such imprisonment with the assent of the execution creditor; but if he escapes, or is discharged without the assent of the creditor, it is not satisfaction of the judgment, 19 O. 362.

§ 5448. For what causes execution against the person may issue. An execution against the person of the debtor may be issued upon any judgment for the payment of money :

1. When the judgment debtor has removed, or begun to remove, any of his property out of the jurisdiction of the court, with intent to prevent the collection of the money due on the judgment.

2. When he has property, rights in action, evidences of debt, or interest or stock in a corporation or company, which he fraudulently conceals with the like intent.

3. When he has assigned or disposed of all or part of his property, or rights in action, or has converted the same into money, with intent to defraud his creditors, or with the intent to prevent such property from being taken in execution.

4. When he fraudulently contracted the debt or incurred the obligation upon which the judgment was rendered.

5. When the judgment was rendered for money, or other valuable thing, lost by playing at any game, or by means of any bet or wager.

6. When he was arrested on an order before judgment, and has not been discharged as an insolvent debtor, or the order has not been set aside as improperly made. [51 v. 57, § 478; 54 v. 30, § 1; S. & C. 667, 1092.]

§ 5449. By whom and how such execution allowed. An execution against the person of the debtor, except as prescribed in § 5451, can be issued only when allowed by the supreme court, the district court, the court of common pleas, or the probate court, or any judge of either, upon being satisfied, by the affidavit of the judgment creditor, or his attorney, and such other evidence as may be presented, of the existence of one or more of the particulars mentioned in the preceding section. [51 v. 57 § 479; S. & C. 1092.]

"That the debtor is about to dispose of his property with intent to defraud his creditors," sufficient under 36 v. 75, 16 O. 304. Jurisdiction of probate judge, 35 Bull 270.

§ 5450. *Id.* May be issued by justice of the peace. A justice of the peace may issue an execution against the person of a judgment debtor, upon being satisfied of the existence of one or more of the same particulars, by like affidavit and evidence. [51 v. 57, § 480; S. & C. 1092.]

§ 5451. *Id.* When issued of course. When the judgment debtor was arrested before judgment, and has not been released from imprisonment by an application for relief as an insolvent debtor, and the order for such arrest has not been adjudged improper, an execution against the person of such judgment debtor may issue of course. [51 v. 57, § 481; S. & C. 1092.]

1 W. L. M. 350.

§ 5452. *Discharge by delivery of property.* A person taken in execution as aforesaid shall be discharged by delivering or setting off to the officer who serves the writ, if issued from a court of record, real or personal property, or if issued by a justice of the peace, personal property only, sufficient to satisfy the judgment and costs for which the writ was issued. [51 v. 57, § 482; S. & C. 1092.]

When the defendant turns out real estate to release his body, the lien of the judgment on other lands of defendant is not thereby discharged, 11 O. 42. Land surrendered, sold without valuation, 2 O. 328 (act 1815).

§ 5453. *Entitled to prison bounds, but execution may issue against property.* A person imprisoned under the provisions of this subdivision shall be entitled to prison bounds, as prescribed by law; but in case the person is out of jail in prison bounds, the judgment creditor, upon whose judgment he was imprisoned, shall be entitled to execution against the lands and tenements, goods and chattels, of the debtor, and all other remedies prescribed by law for the collection of debts. [51 v. 57, § 483; S. & C. 1092.]

§ 5454. *Death of debtor no satisfaction of judgment.* The death of a person under arrest in an action shall not satisfy the judgment; but an execution may issue on the judgment as if no arrest had been made. [51 v. 57, § 484; S. & C. 1093.]

§ 5455. If arrested before judgment, debtor must be charged in execution within ten days. If a person who is imprisoned under an order of arrest made before judgment, be not charged in execution within ten days after judgment, he shall be discharged from such imprisonment. [51 v. 57, § 485; S. & C. 1093.]

§ 5456. When debtor may be discharged. A person imprisoned under this subdivision, or upon an order of arrest before judgment, in civil cases, who is unable to perform the act, or endure the imprisonment, may be discharged therefrom upon such terms as are just, by the court out of which the process issued, or a judge thereof, or by the court in which the judgment was or might have been rendered, or a judge thereof. [51 v. 57, § 486; S. & C. 1093.]

SUBDIVISION VI. PRIVILEGE FROM ARREST. PRISON BOUNDS.

§ 5457. Who are privileged from arrest—When. Members and officers of legislature, electors, judges, attorneys, officers of court, Israelites, militia. The following persons are privileged from arrest, viz.:

1. Members, clerks, sergeants-at-arms, door-keepers, and messengers, of the senate and house of representatives, during sessions of the general assembly, and while traveling to and from such sessions, allowing one day for every twenty-five miles of the distance, by the route most usually traveled; and whoever arrests any such person in violation of this provision shall forfeit and pay one hundred dollars, to be recovered by civil action, in the name and for the use of the person injured. [29 v. 341, § 2; 59 v. 6, § 1; S. & C. 84; S. & S. 18.]

2. Electors, while going to, returning from, or in attendance at elections. [29 v. 341, § 3; S. & C. 84.]

3. Judges of the courts, while attending court, and also during the time necessarily employed in going to, holding, and returning from the court which it is their duty to attend. [29 v. 341, § 4; S. & C. 84.]

4. Attorneys, counselors at law, clerks, sheriffs, coroners, constables, and criers, and all suitors, jurors, and witnesses, while going to, attending, or returning from court. [29 v. 341, § 5; S. & C. 84.]

5. Officers and soldiers of the revolutionary war, and

females, on any mesne or final process for any debt, claim, or demand arising upon contract. [29 v. 341, § 7; S. & C. 84.]

6. Israelites, and such other persons as religiously observe the last or any other day of the week as a day of worship, on such day, within, going to, or returning from their places of worship, or during the time of service, and while going to or returning therefrom. [52 v. 18, § 1; S. & C. 85.]

7. A person doing militia duty under the order of his commanding officer, or while going to or returning from the place of duty or parade. [29 v. 341, § 6; S. & C. 84.]

§ 5458. When and where arrests may not be made. No person shall be arrested during a sitting of the senate, or house of representatives, within the hall where such session is being held, or in any court of justice, during the sitting of such court, or on the first day of the week, commonly called Sunday, or on the fourth day of the month of July. [29 v. 341, § 6; S. & C. 84.]

§ 5459. This subdivision does not extend to crimes, etc. Nothing in this subdivision contained shall be construed to extend to cases of treason, felony, or breach of the peace, or to privilege any person herein specified from being served at any time with a summons or notice to appear; and all arrests, not contrary to the provisions herein contained, made in any place, or on any river or water-course within or bounding upon this state, shall be deemed lawful. [29 v. 341, § 8; S. & C. 84.]

Service on Sunday legal. 1 Bull 115; 42 O. S. 585, 592.

Non-resident suitors attending court privileged from being served with summons in civil actions, 12 Bull 319; 20 Bull 386 46 O. S. 38.

§ 5460. Notice to be given when member or officer of legislature arrested. If, during a session of the general assembly, a member or officer thereof be arrested upon a charge of treason, felony, or breach of the peace, notice thereof shall be given forthwith to the body with which he is connected, by the officer who issued the process upon which the arrest is made. [29 v. 341, § 9; S. & C. 84.]

§ 5461. How and when prisoner may be discharged. A person arrested contrary to the provisions of this subdivision shall be discharged by a writ of *habeas corpus*, or

in a summary way, by motion before the court from which the process issued, at the cost of the party who sued out the process. [29 v. 341, § 10; S. & C. 84.]

§ 5462. Prison bounds fixed. A person imprisoned for debt shall be entitled to the privilege of prison bounds, which shall be co-extensive with the limits of the county; but such prisoner shall not, in any instance, pass over or without such limits. [29 v. 340, § 1; 31 v. 11.]

Jail limits, 1 O. 49.

§ 5463. When prisoner entitled to benefit of prison bounds. A prisoner shall not be entitled to the privilege of prison bounds until he gives bond to the creditors, with two or more sureties, resident in the county, approved by the justice or mayor who issued the process, or, in other cases, by the probate judge, in double the sum for which he stands committed, for his safe continuance in the custody of the jailer, within the limits of the prison bounds, until legally discharged, which bond shall be lodged with the sheriff until the creditor demands the same; and when the condition of the bond is broken, the creditor may put the bond in suit, and have judgment entered against the sureties for the debt, interest, and costs for which the prisoner stands committed. [29 v. 340, § 2; S. & C. 1210.]

Joint bonds given in separate suits are void; and a bond is void unless defendant is actually in prison, and that fact is recited in the bond, 2 O. 277. It is a good defense to an action on a bond given under this section that no order was made by the court or judge authorizing its issue, or that such order was made without the necessary preliminary proof, or that the writ has been quashed, 15 O. 372. A certificate given by a commissioner of insolvents to a debtor who has given bond for the prison limits, discharges the security on the bond, notwithstanding the proceedings are afterwards dismissed in the common pleas, 9 O. 100. Creditor must support prisoner, 1 O. 32; 2 Bull 264. Not bound to furnish lodgings, 1 O. 32.

CHAPTER II.

PROCEEDINGS IN AID OF EXECUTION.

SUBDIVISION I. BY CIVIL ACTION.

§ 5464. When judgment creditor may proceed against equitable assets, etc. When a judgment debtor has not personal or real property subject to levy on execution sufficient to satisfy the judgment, any equitable interest which he has in real estate, as mortgagor, mortgagee, or

otherwise, or any interest he has in any banking, turnpike, bridge, or other joint stock company, or in any money contract, claim, or choses in action (1), due or to become due to him, or in any judgment or order, or any money, goods, or effects which he has in the possession of any person, or body politic or corporate, shall be subject to the payment of the judgment, by action. [51 v. 57, § 458; S. & C. 1086.]

1. 3 C. C. R. 98; 49 O. S. 60. Insufficient answer, 21 Bull 313.

A proceeding under this section is in the nature of a creditor's bill, 18 O. S. 24.

Assignment. If assignment for creditors is fraudulent, property is liable, 5 O. 293. Assignee of judgment can prosecute, 17 O. S. 319.

Bonds of railroad company unissued can not be subjected, 2 D. 465.

County. Nor debts of county, 18 O. 13.

Different defendant's property can be reached in the same bill, 11 O. 292.

Dower. Right to dower is liable, 5 Bull 410; 41 O. S. 540.

Earnings for three months exempted, 25 O. S. 516.

Execution. Issuance and return of *execution* not essential if fact that judgment debtor has no property subject to levy and sale is averred, 2 O. 294; 6 O. 227; 16 O. 317; 13 O. S. 263.

Foreign land is not liable, 1 D. 550.

Form, 11 O. 292.

Fraudulent conveyance set aside at suit of creditor, 18 O. 444; 29 O. S. 597.

Joinder of actions and parties. A cause of action to recover a money judgment, and one in the nature of a creditor's bill to obtain satisfaction of judgment, can not be united, 1 W. L. M. 571; nor a claim against a corporation alleged to be insolvent with a prayer against stockholders indebted to the corporation for arrears of subscription, 1 H. 281; but a judgment creditor of an insolvent railroad corporation may join in the same action a claim to compel payment of unpaid subscriptions for stock and a claim to enforce the individual liability of stockholders for the satisfaction of his judgment, 20 O. S. 190. Plaintiff can not, in a suit against a defendant on a contract to recover money, join debtors of defendant and seek to subject their debts to the payment of his judgment when recovered, 1 H. 217.

Judgment must first be obtained, unless there is a charge or lien, 1 H. 281; 24 O. S. 432; 16 O. 317. When a judgment upon which an action was based to subject a debt due the judgment debtor was set aside at a subsequent term for irregularity, and re-entered, and a supplemental petition based upon the latter judgment was filed, the proceeding was *lis pendens*, and did not authorize the debtor of the judgment debtor to pay him his debt, 10 O. S. 365.

Jurisdiction. A justice of the peace has no *jurisdiction* to subject choses in action belonging to judgment debtor to payment of judgment, 1 H. 557. The Superior Court of Cincinnati and common pleas have jurisdiction, though the judgment is less than one hundred dollars, Id.

Leasehold. Permanent *leasehold* mortgaged can only be reached by this proceeding, 11 O. 356.

Legacy. When payment of legacy is discretionary with executor, creditor of legatee can not subject, 9 Bull 292.

License. Possession by *license* not liable, 3 O. 292; see 8 C. C. 442.

Lien. Judgment creditor acquires no *lien* in equity upon choses in action of debtor until bill is filed, 6 O. 156; 4 O. S. 623; obtains preference by filing bill, 13 O. 197.

Money can be subjected, 1 W. L. M. 143 (but not money in the hands of a person not summoned, 2 Clev. R. 185).

Mortgage. And mortgagor's interest without tender of money due to mortgagee, 17 O. 336.

Partnership property must be first exhausted before action can be maintained to subject moneys owned by one partner to pay partnership debt, 3 O. 287. In action to collect judgment due firm, not necessary to allege that firm was formed for or doing business in Ohio, in averring rendition of judgment in favor of firm, 13 O. S. 210.

Pleading must show that judgment is recovered and that there is no real or personal property sufficient to satisfy debt, 3 O. 287; 16 O. 318. Averment of return of "no goods" insufficient, 1 D. 159; 8 O. 217.

Salaries of city officers may be subjected, 15 O. S. 462; and stockholders' subscriptions, 17 O. 187.

Stock. No action lies against state to compel payment stock subscription, 11 O. 273.

Sureties against whom judgment is had may subject credits of principal to payment of judgment without first paying the debt, 1 O. 533; 4 O. S. 600.

Trust fund. Interest payable to A. for life, with remainder to his heirs, is liable, 2 H. 78.

Vendor's lien for unpaid purchase money subject, 24 O. S. 402.

Miscellaneous. The judgment debtor may be compelled to disclose his means to pay the debt, and the names of his debtors, 11 O. 273, 292. Where several judgment creditors are pursuing the same equitable assets of their common debtor they are entitled to satisfaction in the order in which their liens attached by the filing of their bills, *Id.* In a suit to enforce the collection of a judgment, the judgment debtor can not urge as a defense any error or irregularity in the action in which the judgment was recovered, 10 O. 104. Where it appeared that the creditor had an execution levied on real estate, not disposed of, the proceeds of which could not be known, and there was other property not levied on, the relief was refused, 3 O. 287. In case of excess of debt or assets plaintiff must or court may select, 3 O. 502. Court can order examination of other witnesses than judgment debtor, but referee can not, 11 Bull 144. Stock in corporation already pledged by debtor, 43 O. S. 509. Reversal of judgment no satisfaction, effect of, 2 C. C. 77. Where an action is pending by a judgment debtor to recover damages caused by a nuisance to real estate, the judgment creditor of such debtor, before the claim of the debtor is reduced to judgment, can, by action against the plaintiff and defendant in the nuisance case acquire a lien on such claim, so as to entitle him to payment of the same, if his debtor succeeds in the suit, 3 C. C. 98. Neither the fact that the claim was paid to the judgment debtor by the defendant in the nuisance case, nor the fact that the judgment of the judgment creditor became dormant during the pendency of his action affected the right to have the pro-

ceeds of the claim applied to the payment of the judgment, Id., 49 O. S. 60. In an action by assignee of a judgment to subject equities to the satisfaction of a judgment, debtor may set off indebtedness to him from judgment creditor accruing before assignment, 24 O. S. 204. In a proceeding under this section the action must be founded on the judgment. Such an action can not be maintained upon a judgment which had become dormant at the time of the commencement thereof, 6 C. C. 27. Trustee of corporation can not retain a balance for salary, 18 O. S. 24. Insanity of debtor no defense, 31 O. S. 247. When debt tied up by defense to another suit, 34 O. S. 294. Examination of debtor not subject to review, 11 O. S. 569. Contempt proceedings on refusal to obey order, 4 Bull 733. Priority of lien, 13 O. 197.

SUBDIVISION II. BY GARNISHMENT AGAINST RAILROAD COMPANIES.

§ 5465. Proceedings in aid by garnishment against railroad company. The plaintiff, or his agent or attorney, in a judgment against a railroad company, rendered in any court, upon a claim due to common laborers for work and labor performed for the company, or for cross-ties, lumber, or wood furnished thereto, to be used in the construction, repair, or operation of its road, or for the erection of fences along the line of its road, required by law to be erected, or upon a note, or other evidence of indebtedness, given for the considerations aforesaid, may file with a precept for execution upon such judgment his affidavit, setting forth the claim upon which the judgment is founded, that he has no knowledge of any property of the defendant liable to levy and sale upon the execution, and that a person or corporation, to be therein named, and within the jurisdiction of the officer to whom the execution is to be directed, is indebted to the defendant, or has property or claims of the defendant in his possession or under his control, as agent of the defendant, or otherwise; and thereupon the clerk shall issue a notice to each person or corporation named, to the effect that he is required to pay over and deliver, to the officer holding such writ, the money, property, and claims of the defendant, in his possession or under his control, or which may come into his possession or under his control at any time before the satisfaction of the judgment, not exceeding an amount sufficient to pay the same and costs. [63 v. 126, § 1; S. & S. 119.]

§ 5466. Id. Notice to garnishee. The officer shall

serve upon each garnishee named in the notice a copy of the execution and notice, and the person so served shall be bound to the plaintiff in execution, from the date of such service, for all the money, property, and credits of the defendant, in his possession or under his control, or which may come into his possession or under his control at any time before the satisfaction of the judgment. [57 v. 119, § 2; S. & C. 1174.]

See § 6512. Justice of the peace.

§ 5467. Id. Examination of garnishee. The garnishee may be required, by a written notice, at any time after service on him as above provided, to appear before any officer within his township competent to administer oaths, or before the clerk of the court of common pleas of his county, and answer such questions as may be asked him touching the property of every description, money, and credits of the defendant, in his possession or under his control; the notice shall be signed by the plaintiff, or his agent or attorney, shall specify the time when and place where the examination will be held, and shall be served at least one day before the day fixed for the examination; the examination shall be reduced to writing, signed by the garnishee, certified by the officer before whom it was taken, and filed with the papers in the case; and the garnishee shall be entitled to the same fees for attendance as are allowed to witnesses. [57 v. 119, § 3; S. & C. 1174.]

§ 5468. Id. Attachment against garnishee on failure to appear or refusal to answer. If the garnishee refuse to appear, as required by the notice, an attachment may be issued against him, upon proof made of due service of the notice; or if, having appeared, he refuse to answer such questions as are asked him as aforesaid, the officer before whom the examination is being had shall commit him to the jail of the county until he answers such questions, or is discharged according to law. [57 v. 119, § 4; S. & C. 1174.]

§ 5469. Id. Garnishee to deliver money and property to officer. The garnishee shall pay over to the officer all money in his hands, or under his control, or which may come into his hands or control, belonging to the defendant, not exceeding the amount of the judgment and costs, and deliver to the officer all property and credits of the

defendant in his hands, or which may come into his hands, and take his receipt for such money, property, or credits, which receipt shall be a sufficient discharge of liability therefor; and upon refusal by such garnishee to pay over or deliver as aforesaid, the plaintiff may commence an action therefor, in his own name, against the garnishee, and recover the same, with costs. [57 v. 120, § 5; S. & C. 1174.]

§ 5470. **Id. Officer to sell property.** The officer shall sell, as upon execution, any property of the defendant so delivered to him which would be liable to seizure and sale upon execution, and shall hold all the other property to abide the order of the court. [57 v. 120, § 6; S. & C. 1174.]

§ 5471. **Id. When assignments void.** An assignment or transfer of property, in the hands or under the control of any agent of such railroad company at the date of the service of notice of garnishment, or which may afterwards, and before the satisfaction of the judgment, come into his hands or under his control, shall be void as against judgment claimants under this subdivision. [57 v. 120, § 7; S. & C. 1174.]

SUBDIVISION III. BY EXAMINATION OF DEBTOR.

§ 5472. **Examination of debtor after return of execution.** When an execution against the property of a judgment debtor, or one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he does not reside in the state, to the sheriff of the county where the judgment was rendered, or a transcript of a justice's judgment has been filed, is returned unsatisfied, in whole or in part, the judgment creditor shall be entitled to an order from a probate judge, or a judge of the court of common pleas, of the county to which the execution was issued, requiring such debtor to appear and answer concerning his property before such judge, or a referee appointed by such judge, at a time and place within the county to be specified in the order. [51 v. 57, § 459; S. & C. 1089.]

Superior Court of Cincinnati has no jurisdiction, 9 Bull 241. Court has power to order examination of other witnesses than judgment debtor when satisfied on application of party that additional witnesses should be examined, 11 Bull 144; see 1 Clev. R. 26. An examination of a witness under this section was held admissible in evidence against him in an action to set aside a deed made to him in fraud of creditors, being the

identical matter concerning which he had been examined,
40 O. S. 345.

§ 5473. Examination of debtor before return of execution. After the issue of an execution against property, and upon proof by the affidavit of the judgment creditor, or otherwise, to the satisfaction of the court of common pleas, or a judge thereof, or a probate judge, of the county in which the debtor is found, that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by order, require the judgment debtor to appear at a time and place, in such county, to answer concerning the same; and such proceedings may thereupon be had, for the application of the property of the judgment debtor toward the satisfaction of the judgment, as are prescribed in this subdivision. [51 v. 57, § 460; S. & C. 1089.]

Demand on debtor not required, 11 O. S. 323.

§ 5474. When order of arrest may issue, and proceedings thereon. Instead of the order requiring the attendance of the judgment debtor, as provided in the two preceding sections, the judge may, upon proof, in writing, to his satisfaction, by affidavit of the judgment creditor, or otherwise, that there is danger of the debtor leaving the state, or concealing himself, to avoid the examination herein mentioned, issue a warrant requiring the sheriff to arrest and bring before him the debtor; such warrant can be issued only by a judge of the court of common pleas, or the probate judge, of a county in which the debtor is found, and the sheriff can execute it only within that county; in executing the warrant the sheriff shall deliver to the debtor a copy thereof, and of the testimony on which it issued; the debtor, when brought before the judge, shall be examined on oath, and other witnesses may be examined on either side; if it appear in the examination that there is danger of the debtor leaving the state, or that he has property which he unjustly refuses to apply to the judgment, he may be ordered to enter into an undertaking, with surety, in such sum as the judge may prescribe, that he will attend before the judge or referee for examination, from time to time, as shall be directed; and in default of entering into such undertaking, he may be committed to the jail of the county, by warrant of the judge, as for contempt. [51 v. 57, § 461; S. & C. 1089.]

§ 5475. Examination of debtor of judgment debtor. Effect of such order. Notice to parties. After the return of an execution against the property of a judgment debtor, or of one of several debtors in the same judgment, and upon proof, in writing, by affidavit, or otherwise, to the satisfaction of the judge, that a person or corporation has property of such judgment debtor, or is indebted to him, the judge may, by an order, require such person or corporation, or any officer or member of the corporation, to appear at a specified time and place, within the county in which such person or corporation is served with the order, and answer concerning the same; the service of the order shall bind the property in the possession or under the control of such person or corporation from the time of service; and the person or corporation so served with the order shall be liable to the judgment creditor for all property, money, and credits in his hands belonging to the judgment debtor, or due to him from such person or corporation, from the time of service; but if, on the filing of the affidavit of the judgment creditor, his agent or attorney, the judge is satisfied of the existence of any of the grounds upon which an order of attachment may be issued, as provided in § 5521, the order may be issued before the issue and return of execution; and the judge may also require notice of such proceeding to be given to any party in the action, in such manner as may seem to him proper. [71 v. 53, § 464.]

Debtor of execution debtor can not, after service of order, discharge himself by payment to execution debtor of his indebtedness, 6 O. S. 255. Examination of debtor not subject to review, 11 O. S. 569. Judgment in such proceedings against judgment debtor and his debtor, ordering the latter to pay the amount due from him to judgment creditor, protects him from suit on same demand by judgment debtor; effect of reversal of judgment in original case, 2 C. C. R. 77.

§ 5476. Person not excused from answering because examination may convict him of fraud. No person shall, on examination pursuant to this subdivision, be excused from answering any question on the ground that his examination will tend to convict him of a fraud; but his answer shall not be used as evidence against him in a prosecution for such fraud. [51 v. 57, § 462; S. & C. 1089.]

This section does not apply to a civil action based on discov-

eries made in such proceedings in the probate court, and brought for the purpose of applying upon a judgment property subject to such application, 40 O. S. 345.

§ 5477. **Reference by judge to referee.** The judge may, in his discretion, order a reference to a referee agreed upon, or appointed by him, to report the evidence or the facts. [51 v. 57, § 472; S. & C. 1091.]

Testimony before referee may be used as a deposition in the case, 8 Rec. 364. Refusal to confirm referee's finding not subject to review, 2 Clev. R. 185.

§ 5478. **Proceedings may be continued.** The judge or referee, acting under the provisions of this chapter, may continue his proceedings from time to time, until they are completed. [51 v. 57, § 471; S. & C. 1091.]

§ 5479. **Attendance of parties and witnesses enforced.** A party or witness may be compelled, by an order of the judge, or by a subpoena, to attend before a judge or referee, to testify. [51 v. 57, §§ 465, 466; S. & C. 1090.]

Attendance enforced only by order of judge, 1 Clev. R. 26; see 11 Bull 144.

§ 5480. **Examination before referee to be certified.** Oath. If before a referee, the examination must be taken by the referee, and certified to the judge; all examinations and answers before a judge or referee must be on oath; and when a corporation answers, the answer must be on the oath of an officer thereof. [51 v. 57, § 466; S. & C. 1090.]

See § 5213.

§ 5481. **How disobedience of order punished.** If a person, party, or witness disobey an order of the judge, court, or referee, duly served, he may be punished as for contempt; and such referee may, at his discretion, report the case to the court, or judge, and such court or judge may punish for contempt as provided in chapter 4, division 7, title 1, of the Revised Statutes of Ohio. [59 v. 48, § 473; S. & S. 566; 86 v. 48.]

There is no power under this section, or any other, to imprison for refusal to obey the order where the person having possession of the money claims to own it, 42 O. S. 111, 112; see 4 Bull 733; 5 C. C. 78; 27 Bull 289, 291.

§ 5482. **Debtor may pay execution against creditor.** After the issue of execution against property, a person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge for the amount so

paid, or directed to be credited by the judgment creditor on the execution. [51 v. 57, § 463; S. & C. 1089.]

And the same rule applies to an execution held by a constable and issued by a justice of the peace, 15 O. S. 176. See 50 O. S. 589.

§ 5483. Judge may order property to be applied on execution. The judge may order any property of the judgment debtor, or money due to him, not exempt by law, in the hands either of himself or other person, or of a corporation, to be applied toward the satisfaction of the judgment; but the earnings of the debtor for his personal services, at any time within three months next preceding the order, can not be so applied, when it is made to appear, by the affidavit of the debtor, or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor. [51 v. 57, § 467; S. & C. 1090.]

The mode of applying property under this section is not prescribed, but it must be in analogy as to claims of the debtor against third persons, to the remedies to which the debtor himself might resort. The court, or judge, is not, under this section, authorized to settle disputes between the debtor and a third person, or to enforce the collection of claims by order of payment and attachment. Where claims are to be collected, the appointment of a receiver is the proper course, 11 O. S. 323. A judge can not, under this section, enforce the payment of a debt, in the absence of all fraud, by imprisonment, as for a contempt, but may direct the application of the proceeds of the debt, when collected by a receiver or otherwise, 6 O. S. 255. Earnings of debtor, etc., exempt; see 25 O. S. 516. See § 5480, subdivision 6th, 49 O. S. 651.

§ 5484. Judge may appoint receiver, and prohibit transfer, etc., of property. The judge may, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor; and he may also, by order, forbid a transfer, or other disposition of, or any interference with, the property of the judgment debtor not exempt by law. [51 v. 57, § 468; S. & C. 1090.]

§ 5485. Liability of sheriff on official bond. If the sheriff be appointed receiver, he and his sureties shall be liable on his official bond as such receiver; and if another person be appointed, he shall take an oath and give an undertaking as in other cases. [51 v. 57, § 470; S. & C. 1091.]

§ 5486. Proceedings when another has an ascertainable interest in the property. Sale of debtor's interest. If it

appear that the judgment debtor has an interest in real estate, in the county in which proceedings are had, as mortgagor, mortgagee, or otherwise, and his interest can be ascertained as between himself and the person holding the legal estate, or the person having a lien on or interest in the same, without controversy as to the interest of such person holding such legal estate, or interest therein, or lien on the same, the receiver may be ordered to sell and convey such real estate, or the interest of the debtor therein; such sale shall be conducted, in all respects, in the same manner as is provided for the sale of real estate upon execution; and the proceedings of all sales shall, before the execution of the deed, be approved by the court in which the judgment was rendered, or the transcript filed. [51 v. 57, § 469; S. & C. 1090.]

§ 5487. Orders, etc., to be signed by judge, filed with clerk, and minute made on execution docket. The order mentioned in §§ 5472, 5473, and 5475, shall be in writing, and signed by the judge who makes the same, and shall be served as a summons; and the judge shall reduce all his orders to writing, which, together with a minute of his proceedings, signed by himself, shall be filed with the clerk of the court of the county in which the judgment is rendered, or the transcript of the justice is filed, and the clerk shall enter on his execution docket the time of filing the same. [51 v. 57, § 474; S. & C. 1091.]

No record is required, but the judge must file his "orders" and a "minute of his proceedings" with the clerk, who alone can certify transcripts thereof, 1 W. L. M. 87.

§ 5488. Compensation of probate judge. The probate judge shall be allowed for his services under this subdivision the sum of three dollars in each case, and such fees as are allowed by law to clerks of the court of common pleas for similar services. [51 v. 57, § 476; S. & C. 1091.]

§ 5489. Costs. The judge shall allow to clerks, sheriffs, referees, receivers, and witnesses, such compensation as is allowed for like services in other cases, to be taxed as costs in the case, and shall enforce by order the collection thereof, from such party or parties as ought to pay the same. [51 v. 57, § 475; S. & C. 1091.]

The judge is authorized to order the costs to be paid by such party as ought to pay the same, 1 W. L. M. 87.

SUBDIVISION IV. BY ATTACHMENT.

§ 5490. When enforced by attachment. When the judgment is not for the recovery of money or real property it may be enforced by attachment, by the court which rendered the same, upon motion made, or by a rule of the court upon the defendant; but in either case notice of the motion, or a service of a copy of the rule, shall be made on the defendant a reasonable time before the order of attachment is made. [51 v. 57, § 488; S. & C. 1093.]

§ 5318n.

DIVISION VI. PROVISIONAL REMEDIES.

CHAPTER I.

ARREST AND BAIL.

§ 5491. Arrest in civil actions only as prescribed by this title. A defendant in a civil action can be arrested before judgment in the manner prescribed by this title, and not otherwise; but this provision shall not apply to proceedings for contempt, nor to actions prosecuted or judgments obtained in the name of the state of Ohio to recover fines or penalties. [51 v. 57, § 145; S. & C. 991.]

§ 5492. By whom and when order of arrest may be made. An order for the arrest of the defendant shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his authorized agent or attorney, made before a judge or clerk of any court of the state, or a justice of the peace, stating the nature of the plaintiff's claim, that it is just, and the amount thereof, as nearly as may be, and establishing one or more of the following particulars:

1. That the defendant has removed, or begun to remove, any of his property out of the jurisdiction of the court with intent to defraud his creditors.
2. That he has begun to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors.
3. That he has property, or rights of action, which he fraudulently conceals.

4. That he has assigned, removed, disposed of, or begun to dispose of, his property, or a part thereof, with intent to defraud his creditors.

5. That he fraudulently contracted the debt, or incurred the obligation, for which suit is about to be or has been brought.

6. That the money, or other valuable thing, for which a recovery is sought in the action, was lost by playing at any game, or by means of a bet or wager.

The affidavit shall also contain a statement of the facts claimed to justify the belief in the existence of one or more of such particulars. [51 v. 57, § 146; 54 v. 30, § 1; S. & C. 667, 991.]

See § 6483. The statute must be strictly construed, 14 O. S. 213. The affidavit must state the amount of the debt with certainty, 10 O. 263; but if plaintiff does not know the precise amount he should say "as nearly as he is able to state, and which amount named is not greater than the amount justly due him from the said defendant," Yapple's Pr. etc. 89. The amount sworn to in the affidavit must be indorsed on the writ, 10 O. 263, but not the amount for which the defendant is held to bail, 16 O. 304. Affidavit under former statute, that defendant is about to move, without stating facts from which the inference is drawn, insufficient, 2 W. L. J. 426.

4. An affidavit in the words of the act 1838, that the debtor is "about to dispose of his property with intent to defraud his creditors," sufficient, 16 O. 304.

5. An affidavit that plaintiff's brokers sold his stocks under his direction, received the money, stating the amount over and above all charges, and embezzled and converted the same to their own use, sufficient, 44 O. S. 636. If the defendant on a motion to vacate the arrest files his affidavit, he may be examined by the plaintiff notwithstanding his answers may tend to criminate him, Id.

An order based on an affidavit which does not contain a statement of the facts claimed to justify the affiant's belief is void, for want of legal authority in a justice to issue it, and an arrest under it is illegal, 14 O. S. 213.

§ 5493. *Id.* Not to be issued unless bond given. The order of arrest shall not be issued by the clerk until there is executed, by sufficient sureties of the plaintiff, a written undertaking, to the effect that the plaintiff shall pay to the defendant all damages, not exceeding double the amount of the plaintiff's claim stated in the affidavit, which he may sustain by reason of the arrest if the order prove to have been wrongfully obtained. [51 v. 57, § 147; S. & C. 992.]

§ 5494. When it may issue. The order may be made to accompany the summons, or at any time afterward, before judgment. [51 v. 57, § 148; S. & C. 992.]

§ 5495. To whom delivered, and contents. It shall be addressed, and delivered, with a copy of the affidavit, to the sheriff, and shall specify the names of the parties, the court in which the action is brought, and the amount of the plaintiff's claim stated in the affidavit, and shall require the sheriff to arrest the defendant, and hold him in bail in double that sum, and to make return of the order on a day to be named therein, with the undertaking of the bail, if any be given. [51 v. 57, § 149; S. & C. 992.]

Insertion of mere initial letters of plaintiff's Christian name is a fatal defect in the description of the person, 10 O. 233. A writ describing the plaintiff as Brazilla Smith instead of Barzilla Smith, and designating justice of the peace, J. P., held sufficient, 7 O. (Pt. 2) 236.

§ 5496. When order of arrest returnable. The return day of the order of arrest, when the order is issued at the commencement of the suit, shall be the same as that of the summons; and when issued afterward, it shall be fifteen days after it issued. [51 v. 57, § 150; S. & C. 992.]

§ 5497. How executed. The sheriff shall execute the order by arresting the defendant, and delivering to him a copy thereof, and of the affidavit; and if the defendant can not be found before the return day, the plaintiff may have further orders, without other affidavit or undertaking, until the defendant is arrested; but an order of arrest shall not be issued to any other than the county in which the action is brought. [51 v. 57, § 151; S. & C. 992.]

§ 5498. Commitment of defendant to jail. The defendant, when arrested, shall be committed to the jail of the county, and kept in custody until discharged by law. [51 v. 57, § 152; S. & C. 992.]

The imprisonment of the debtor operates as a satisfaction so long as the imprisonment continues, or if he is discharged with the assent of the creditor, the discharge operates as a satisfaction, otherwise if he escape or is discharged without the creditor's assent, 19 O. 362.

§ 5499. Defendant may deposit money and be discharged. The defendant may, before or after giving bail, deposit with the sheriff, or in court, the amount of money specified in the order of arrest; whereupon he shall be discharged, or his bail, if any has been given, shall be released. [51 v. 57, § 153; S. & C. 993.]

§ 5500. Money deposited to be paid into court. The sheriff shall pay into court the money received by him

in lieu of bail; and if it be received in vacation, he shall pay it on the first day of the next term, and if received during the term, he shall pay it immediately. [51 v. 57, § 154; S. & C. 993.]

§ 5501. **Court to have control of money.** The court shall make proper orders for the safe-keeping of money deposited in lieu of bail, and may direct the sheriff to keep the same, and, after final judgment in the action, shall order it to be paid to the party entitled thereto, according to the result. [51 v. 57, § 155; S. & C. 993.]

§ 5502. **Sheriff and sureties liable for the money.** Money so deposited with the sheriff, or directed by the court to be kept by him, shall be held upon his official responsibility; and he and his sureties shall be liable, and may be proceeded against, for any default in relation thereto, as in other cases of delinquency. [51 v. 57, § 156; S. & C. 993.]

§ 5503. **When and how bail to be taken.** Bail may be given by the defendant on his arrest, or at any time afterward, before judgment; it shall be done by causing sufficient bail to execute a written undertaking to the plaintiff, in the presence of the sheriff, to the effect that, if judgment be rendered in the action against the defendant, he will render himself amenable to the process of the court thereon; and the undertaking, when accepted, shall be returned to the clerk's office, and the defendant shall be discharged. [51 v. 57, § 157; S. & C. 993.]

Bail discharged by judgment for defendant, though afterward reversed, 20 O. S. 567.

§ 5504. **Plaintiff may object to bail.** The plaintiff, or his attorney, may object to the bail for insufficiency, at any time within ten days after the undertaking is given, by serving upon the sheriff a written notice that he does not accept the bail; a failure to serve such notice shall be deemed an acceptance of the bail, and the sheriff shall be exonerated from liability; and when the undertaking is given after the return of the order of arrest, the plaintiff shall have notice thereof. [51 v. 57, § 158; S. & C. 994.]

§ 5505. **Notice of justification.** The sheriff, or the defendant, may, within ten days after the receipt of such notice, give to the plaintiff, or his attorney, notice in writing of the justification of the same or other bail before a judge or clerk of the court in which the action is

brought, a probate judge, or a justice of the peace, at a time, not less than five nor more than ten days thereafter, and a place, to be specified therein; and if other bail be given, a new undertaking must be executed. [51 v. 57, § 159; S. & C. 994.]

§ 5506. **Manner of justification.** For the purpose of justification, each of the bail must attend before the proper officer, at the time and place mentioned, and may be examined on oath touching his sufficiency, in such manner as the officer deems proper. [51 v. 57, § 160; S. & C. 994.]

§ 5507. **Allowance of bail.** If the officer find the bail sufficient, he shall indorse his allowance on the undertaking, and cause it to be filed with the clerk; and the sheriff shall thereupon be discharged from liability. [51 v. 57, § 161; S. & C. 994.]

§ 5508. **When sheriff liable as bail and how discharged.** If, after the arrest of the defendant, he escape, or be rescued, or bail be not taken or be adjudged insufficient, or a deposit be not made, the sheriff shall be liable as bail; but he may discharge himself from liability by putting in sufficient bail at any time before judgment. [51 v. 57, § 162; S. & C. 994.]

Insufficiency of jail no defense, 13 O. S. 177; nor privilege of prisoner from arrest, 13 O. S. 182.

§ 5509. **Liability of sheriff, how fixed.** The return of "not found," upon an execution against the body of the defendant, shall be necessary to fix the liability of the sheriff as bail, which liability shall be the amount of the judgment, interest, and costs; and this liability can be enforced only in a separate action against him, or against him and his sureties on his official bond, as in other cases of delinquency. [51 v. 57, § 163; S. & C. 994.]

§ 5510. **Bail adjudged insufficient liable to sheriff.** The bail adjudged insufficient shall be liable to the sheriff for the damages he may sustain by reason of such insufficiency. [51 v. 57, § 164; S. & C. 994.]

§ 5511. **Liability of bail, how fixed.** The liability of the bail shall be fixed in the manner provided in § 5509 for fixing the liability of the sheriff as bail; and the bail can be proceeded against in an action only. [51 v. 57, § 165; S. & C. 994.]

§ 5512. **Surrender of defendant a discharge of bail.** A

surrender of the defendant to the sheriff of the county in which he was arrested, with a delivery of a certified copy of the undertaking of the bail, whether such surrender is made by the defendant himself, or by his bail, shall discharge the bail; such surrender may be made at any time before the return day of the summons in an action against the bail; the sheriff shall give to the bail a written acknowledgment of the surrender, and hold the defendant in his custody, upon such copy of the undertaking of the bail, as upon an order of arrest; and the clerk of the court shall, on the production to him of the sheriff's acknowledgment of the surrender, enter on the undertaking an exoneration of the bail. [51 v. 57, § 166; S. & C. 994.]

After their liability is fixed, bail can not surrender defendant and be discharged, 7 O. S. 514; but in an action on the bond, the court has power, at any time before judgment, to grant bail further time in which to surrender the judgment debtor, 35 O. S. 131.

§ 5513. **Bail may arrest defendant.** The bail may, for the purpose of surrendering the defendant, arrest him at any time or place before he is finally charged, or, by a written authority indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so. [51 v. 57, § 167; S. & C. 995.]

§ 5514. **For what causes bail may be exonerated.** The bail shall be exonerated by the death of the defendant, or by his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process of the court, or by his surrender to the sheriff of the county in which he was arrested in the execution of such process, within the time fixed in § 5512, or within such further time as the court in which the action is pending may allow. [51 v. 57, § 168; S. & C. 995.]

§ 5515. **Bail may be substituted for a deposit of money.** If money be deposited by the defendant, as provided in § 5499, bail may be given and justified, upon notice as prescribed in § 5505, at any time before judgment; and thereupon the court in which the action is brought, on being satisfied that the bail has been given and adjudged sufficient, shall direct that the money deposited be refunded to the defendant, and it must be refunded accordingly. [77 v. 40; 51 v. 57, § 169; S. & C. 995.]

§ 5516. When proceedings against bail may be stayed and bail discharged. If, at any time before or after judgment against the bail, proceedings in error be commenced on the judgment against the principal, in the suit in which their undertaking was taken, the court may, on motion, stay proceedings against such bail for a reasonable time, on payment by them of all costs that have accrued against them; and if, on such proceedings, the judgment against the principal be reversed, and the principal be discharged from such suit, the bail shall be discharged from the undertaking. [51 v. 57, § 170; S. & C. 996.]

§ 5517. Mode of vacating order of arrest or reducing amount of bail. A defendant who is arrested may, on motion, at any time before judgment in the action, apply to the court in which suit is brought, if in session, and, in vacation, to a judge thereof, or to any judge of a court of record of the state, to vacate the order of arrest, or to reduce the amount of the bail; and the court or judge shall allow to him such time for preparation, and the hearing of the motion, as is just and reasonable; but reasonable notice of such motion must be given to the plaintiff. [64 v. 10, § 171; S. & S. 544.]

§ 5518. Motion may be supported and opposed by affidavits. When the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other evidence, in addition to the evidence on which the order of arrest was made. [51 v. 57, § 172; S. & C. 996.]

§ 5519. Jail fees, how paid. A person who causes another to be committed to jail under the provisions of this chapter shall be liable, in the first instance, for the jail fees, and shall, if required by the jailer, pay such fees weekly in advance; and the fees so paid shall be a part of the costs of the case. [51 v. 57, § 173; S. & C. 996.]

This section has no application to a case of imprisonment of a defendant, by order of court, after conviction under the bastardy act, 15 O. S. 43. Fees not exceeding fifty cents per day, § 1235.

§ 5520. When sheriff may discharge prisoner. The sheriff or jailer may discharge a person imprisoned on mesne or final process issued in a civil proceeding, at any time when there is no money in his hands to pay for the sustenance of such prisoner; or, he may detain the

prisoner, and hold the adverse party liable for such sustenance. [51 v. 179, § 168; S. & C. 799.]

Sheriff or jailer may permit the prisoner to go at large, if, on demand, the judgment creditor does not pay the jail fees weekly in advance, 13 O. S. 182. Neither the sheriff nor county commissioners are bound to feed an insolvent prisoner in jail, 6 O. 439.

CHAPTER II.

ATTACHMENT.

SUBDIVISION I. GROUNDS OF ATTACHMENT.

§ 5521. **Grounds of attachment.** In a civil action for the recovery of money, the plaintiff may, at or after the commencement thereof, have an attachment against the property of the defendant, upon the grounds herein stated :

1. When the defendant, or one of several defendants, is a foreign corporation, or a non-resident of this state; or,
2. Has absconded, with the intent to defraud his creditors; or,

3. Has left the county of his residence, to avoid the service of a summons; or,

4. So conceals himself that a summons can not be served on him; or,

5. Is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors; or,

6. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,

7. Has property, or rights in action, which he conceals; or,

8. Has assigned, removed, disposed of, or is about to dispose of his property, or a part thereof, with the intent to defraud his creditors; or,

9. Has fraudulently or criminally contracted the debt, or incurred the obligation, for which suit is about to be or has been brought.

But an attachment shall not be granted on the ground that the defendant is a foreign corporation or a non-resident of this state for any claim other than a debt or demand arising upon contract, judgment, or decree, or for causing death or a personal injury by a negligent or wrongful act. [88 v. 65; 62 v. 10, § 191.]

Action to enforce statutory liability of stockholder, 2 N. P. 260.

An attachment did not lie against the property of a married woman in an action to charge her separate estate, in which no personal money judgment could be rendered against her, 24 O. S. 389. It lies against a husband for partnership debts of husband and wife, Id. 87. An attachment can not issue until petition is filed, 35 O. S. 661. An action will lie for falsely and maliciously suing out a writ of attachment against the plaintiff's effects to his injury, though it be admitted that he was indebted to defendant; and a creditor's false affidavit that his resident debtor absconds is not probable cause for the issue of an attachment against his effects, 9 O. 103; 8 O. S. 548; and in such action it is not necessary to aver in the petition or prove on the trial that the attachment had been discharged or otherwise terminated adversely to the claim of the party employing it; nor when the trial and judgment in the former suit did not necessarily involve the question of the existence of probable cause for issuing the attachment, is it necessary to aver and prove the termination of the former suit, 8 O. S. 548. Court can not discharge property on motion of defendant on the ground that the property does not belong to him, 10 O. S. 439. In some cases an attaching creditor takes more than the interest of his debtor, as where a debtor has parted with his interest by a conveyance which is invalid as to creditors, 19 O. S. 476. In an action when property is attached and summons returned "not served," no time is fixed by statute within which service by publication must be made. Hence where the service by publication was not completed until eight months after the return of summons, it is error to dismiss the action for an alleged want of jurisdiction by reason of such delay, 41 O. S. 271. Amendment of petition can not enlarge scope of attachment, 2 C. C. 110. Attachment on goods belonging to firm issued against member of firm can not take precedence of attachment against firm though it is a prior levy, Id. The right of attaching creditors may properly be determined upon a motion for the distribution of the fund, Id. A mistake in notice by publication does not vitiate an attachment properly issued and levied, Id. Bringing property into Ohio to be attached is fraudulent, 19 Bull 257. Summons to issue, 1 N. P. 124.

1. *Foreign corporation. Non-resident.* The words "foreign corporation" in the justice's code, 1853, did not include a corporation created by the laws of this state, and located therein, 12 O. S. 139. *Non-resident.* Attachment lies against a non-resident stockholder in Ohio corporation, 21 O. S. 221; by one partner against another non-resident partner after dissolution, 12 O. S. 165; by surety, on behalf of creditor, against principal debtor, for a debt past due, on the ground of non-residence, 2 D. 436; before debt due, see 11 O. S. 579; 12 O. S. 158. Jurisdiction is acquired against a non-resident by the issuing of process, based upon the requisite affidavit, and the attachment of the property, 15 O. 436; 17 O. 409; see 2 D. 168; but where the property is sought to be reached by process of garnishment only, the answer of the garnishee that he is not indebted, and has no property in his possession belonging to the defendant, does not oust the court of jurisdiction, 31 O. S. 537; 29 O. S. 120. If, after thus acquiring jurisdiction, the court proceed to render judgment without the publication of notice, such judgment is not void, and can not be collaterally impeached, but must be reversed on error, 15 O. 436. By demurring to the petition, a non-resident brings himself as fully within the jurisdiction of the court as if he had been served with summons in the action, 29 O. S. 120. An affidavit in attachment, stating as

the sole ground for the attachment that the defendant is a "non-resident of the county," made before a justice of the peace, in a case subsequently certified to the common pleas, under § 6514, is not sufficient to authorize the issuing of an order of attachment in the common pleas, 26 O. S. 529. Under the act of 1810, a foreign attachment could not be sustained against one of several joint and several contractors, 4 O. S. 132; and under the act of 1824, an attachment could not be sustained against one of several contractors who was a resident of the state when the others were non-residents, 4 O. S. 150. Foreign insurance company made garnishee by service on managing agent, 15 Bull 333; see 28 Bull 246; non-resident partners, 51 O. S. 300; 9 C. C. 280.

2. "*Has absconded with the intent to defraud his creditors.*" Where one partner absconds and the other disposes of a part, and is disposing of the whole, of the partnership effects, it will be presumed that they intend to delay and hinder their creditors so as to form a good ground of attachment against the partnership property, 1 H. 87.

4. "*So conceals himself that a summons can not be served upon him.*" See 2 Bull 86 (§ 6489). The fact that a summons is issued and returned "not found" has no tendency to show that the defendant is concealing himself with intent to evade process, and, on the other hand, that intent may appear clearly from other facts, *Id.*

8. "*Has assigned his property with the intent to defraud his creditors.*" An attachment on this ground will be set aside where the sole evidence to support it is a conveyance, which, if fraudulent at all, is so only by construction of law under the provisions of the statute of frauds, and it is shown affirmatively that, even if, in its consequences as to creditors, the conveyance be fraudulent, such consequences were not in fact contemplated or intended, 8 Rec. 744; see 3 W. L. G. 281. The fact of a conveyance alone, when defendant was insolvent, will not justify an attachment, though it might justify a bill in chancery to set aside the conveyance, 4 Bull 1064. Intentional fraud must be proven, 1 C. C. R. 76; 32 Bull 135. Evidence of fraudulent conveyance and its effect, 11 Bull 272; 22 Bull 98.

9. "*Has fraudulently,*" 22 O. S. 388, "*or criminally contracted the debt.*" In cases of assault and battery, 22 O. S. 111, 115; 31 O. S. 57. The fraudulent conversion of promissory notes, bills of exchange, etc., does not create "an obligation fraudulently incurred," 1 D. 469. An obligation fraudulently incurred is no ground for attachment unless it is an obligation by contract, *Id.* "But an attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of this state, for any claim other than a debt or demand arising upon contract, judgment, or decree, etc.," 24 O. S. 481; and an amendment of the petition and affidavit, showing a cause of action arising on contract, will not give jurisdiction without the issuance of an attachment after the amendment, *Id.* A contract for agent's commissions comes within the rule, 2 Bull 94, and the implied contract of a common carrier to protect passengers from injury, 31 O. S. 537, but not an action for breach of promise to marry, 2 Bull 4. Misrepresentation as to solvency—special finding, 16 Bull 354. Malicious prosecution not within section, 8 C. C. 157.

SUBDIVISION II. HOW ATTACHMENT OBTAINED.

§ 5522. **Requisites of affidavit for attachment.** An or-

der of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing:

1. The nature of the plaintiff's claim;
2. That it is just;
3. The amount which the affiant believes the plaintiff ought to recover; and
4. The existence of any one of the grounds for an attachment enumerated in the preceding section. [51 v. 57, § 192; S. & C. 1003.]

A writ of attachment without the requisite affidavit is void, 33 O. S. 254. The affidavit need not show that affiant is agent, 3 W. L. J. 131; see 15 Bull 359; nor why it was made by attorney, 29 O. S. 423. Affidavit alleging ground of attachment in the disjunctive is insufficient, 1 H. 48; 1 D. 1; see 9 O. S. 388; 7 Bull 334, as that defendant "fraudulently or criminally" contracted the debt, 13 Bull 35, for the words "fraudulently" and "criminally" are not synonymous, 22 O. S. 114; 31 O. S. 57. An affidavit in the language of the statute is sufficient, 12 O. S. 335; 9 O. S. 397; and if the court think proper to act upon an affidavit stating the ground for attachment substantially in the language of the statute, it is not proper cause for reversal on error, 9 O. S. 388. It is not indispensable that the affidavit contain the exact words of the statute, provided it contains language fully equivalent, or clearly showing the ground specified or intended, 31 O. S. 57. An affidavit is sufficient if it states positively the amount due upon plaintiff's claim, instead of showing the amount which he "believes the plaintiff ought to recover," 21 O. S. 82. An affidavit stating that plaintiff believes that defendant had absconded, with intent to defraud his creditors, without setting forth facts justifying such belief, is insufficient, 17 O. S. 640; and an affidavit merely setting forth the belief of plaintiff, or his agent, that the debt for which the action is brought was fraudulently contracted, without stating any facts on which the belief is founded, is insufficient, 23 O. S. 192. The affidavit and order for attachment constitute no part of the pleadings, and the grounds for the attachment should not be stated in the petition, 9 O. S. 388; 33 O. S. 254; 35 Bull 290; but averments in the petition may, by express reference, be incorporated in the affidavit, 16 Bull 398. If the omission of a separate affidavit can be cured by a showing in the petition, it should contain all the requisites of an independent affidavit, and be duly verified; and where the petition, treated as an affidavit, does not show that the claim sued on is just, nor state the amount the affiant believes he ought to recover, and is verified upon belief merely, it is insufficient to cure the omission of a separate affidavit, 33 O. S. 254. The proper mode for defendant to meet the charge made in the affidavit is by motion, 9 O. S. 388. Leave given to amend affidavit, see 1 Bull 334. Statutory liability, etc., 2 N. P. 260.

§ 5523. **When undertaking required.** When the ground of the attachment is that the defendant is a foreign corporation, or a non-resident of this state, the order of at-

attachment may be issued without an undertaking; but in all other cases the order shall not be issued by the clerk until there is executed in his office, by sufficient surety of the plaintiff, to be approved by the clerk, an undertaking, in a sum equal to double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment if the order prove to have been wrongfully obtained. [51 v. 57, § 193; S. & C. 1004.]

Failure to give the undertaking is a mere irregularity, of which defendant in attachment can alone take advantage, 19 O. S. 296. Want of a seal does not affect its validity, 37 O. S. 484; nor the omission of the name of the surety in the body of the instrument, *Id.*; see 38 O. S. 375. Leave to sue is not necessary, 1 H. 515. An action on an undertaking given to A and B may be prosecuted in their names as partners where it appears that the injury was the wrongful seizure of property owned by them as partners, 23 O. S. 358. It is sufficient to aver in the petition that the attachment was wrongfully obtained, but it is not necessary to state that the attachment was sued out without probable cause; it must appear, however, that the attachment has been dismissed by the court, or abandoned by the plaintiff, 1 H. 515. An action on such undertaking may be prosecuted by those obligees who have an interest in the damages sought to be recovered, without making other obligees, who have no interest in the action, parties, 23 O. S. 358. In such action it is not necessary to aver or prove that the attachment has been discharged as to those obligors who are not necessary parties to the action. *Id.* The recovery should be limited to such damages as defendant in attachment may have suffered from being deprived of his property, its loss, destruction, or deterioration, with the costs and expenses he has incurred in the defense of the original suit, 1 H. 515. Interruption to business, caused by wrongful seizure and detention of stock of goods kept for sale by retail, is an element of damage, 23 O. S. 358. Compensation in such cases includes reasonable costs and expenses incurred in procuring the discharge of the attachment and the restoration of the attached property. Damages supposed to result by reason of injury to reputation of goods by the levy can not be recovered, *Id.* The execution of a redelivery bond, under § 5529, is no bar to the action, 23 O. S. 358. An action upon the undertaking does not preclude defendant from instituting another suit for malicious prosecution, 1 H. 515.

§ 5524. Order of attachment; to whom directed, and its command. The order of attachment shall be directed and delivered to the sheriff, and shall require him to attach the lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, money, and effects of the defendant, in his county, not exempt by law from being applied to the payment of plaintiff's claim, or so much thereof as will satisfy the plaintiff's

claim, to be stated in the order as in the affidavit, and the probable costs of the action, not exceeding fifty dollars. [51 v. 57, § 194; S. & C. 1004.]

Equitable interests are subject to attachment, 14 O. S. 457; see 1 H. 153; 2 Id. 202. Grantor's interest in land conveyed by defective and unrecorded deed, 15 O. 435. Mortgagor's interest in chattel property, 14 O. S. 457; see 18 O. S. 184. Interest of partner, 1 H. 22. Stock, 21 O. S. 221; and when pledged before service of attachment, attachment reaches surplus after payment of debt, 43 O. S. 509; but defendant's property, after assignment, can not be attached, 2 H. 101; nor property in the hands of an officer, unless he is proceeded against as garnishee, 19 O. S. 587; 21 O. S. 142; nor evidences of debt, 2 H. 202; nor debtor's earnings for three months preceding levy, when necessary for the support of his family, 25 O. S. 516. *Bona fide* purchaser of land attached without notice of equity takes a good title, 15 O. 435; 16 O. S. 440; see 9 O. 108. Partnership, 2 C. C. R. 110. Levy of order of attachment in absence of process of garnishment has no greater operation than the levy of an execution, 38 O. S. 76. Foreign assignment for benefit of creditors, valid under law of state where made, to convey real estate and filed in probate court in county where land situated leaves no title in assignor subject to attachment, 17 Bull. 174.

§ 5525. **Orders of attachment may issue to different counties.** Orders of attachment may be issued to the sheriffs of different counties; and several of them may, at the option of the plaintiff, be issued at the same time, or in succession; but such only as have been executed shall be taxed in the costs, unless otherwise directed by the court. [51 v. 57, § 195; S. & C. 1005.]

Under this section the city is to be considered as a county, 2 H. 204. Where an attachment against a non-resident is levied in one county, the court has jurisdiction to issue a writ of attachment against other property in another county, and in such case the fact that the fund in the former county is consumed by prior liens and does not pay plaintiff any thing does not destroy the jurisdiction or lien of the levy in the other county, 21 Bull. 122.

§ 5526. **When order of attachment returnable.** The return day of the order of attachment, when the order is issued at the commencement of the action, shall be the same as that of the summons; and when issued afterward, it shall be twenty days after it issued. [51 v. 57, § 196; S. & C. 1005.]

SUBDIVISION III. EXECUTION AND RETURN.

§ 5527. **When several orders issue.** Order of execution. When there are several orders of attachment against the same defendant, they shall be executed in the

order in which they were received by the sheriff. [51 v. 57, § 197; S. & C. 1005.]

Issuing of general execution is no waiver of priority of attachment, 36 O. S. 94. In an action by one of several attaching creditors against the others after judgment to determine the priority of the several liens acquired by seizure under the respective orders of attachment, the lien of any attaching creditor may be defeated by showing that his attachment was issued without authority of law, 35 O. S. 661.

§ 5528. How order executed. The sheriff shall execute the order of attachment without delay; he shall go to the place where the defendant's property is, and there, in the presence of two freeholders of the county, declare that, by virtue of the order, he attaches the property at the suit of the plaintiff (1); the officer, with the freeholders, who shall be first sworn by the officer, shall make a true inventory and appraisement (2) of all the property attached, which shall be signed by the officer and freeholders, and returned with the order; when the property attached is real property, the officer shall leave with the occupant thereof, or, if there is no occupant, in a conspicuous place thereon, a copy of the order; and when it is personal property, and can be come at (3), he shall take it into his custody, and hold it subject to the order of the court. [51 v. 57, § 198; S. & C. 1005.]

1. The duty of the officer to attach the property in the presence of two freeholders ("two credible persons") is directory, and not imperative; if omitted, the levy may be set aside at the instance of the defendant, but is binding on third parties, and is well performed if the declaration is made in the presence of persons casually present, 1 D. 405, § 6493. 2. Under the law of 1805 the omission of the sheriff to sign the inventory and appraisement was held a mere irregularity that did not affect the validity of the proceedings, 7 O. (Pt. 1) 257. 3. The expression, when the property "can be come at," refers to the nature and position of the property, and not to the character of the title and interest of the owner, 1 H. 23. In order to constitute the levy of an attachment on personal property, it must be taken into the custody of the officer levying the writ. The property may be placed by the officer in the possession of a person acting for him as keeper, but can not be left in possession of the debtor, and subject to his control, unless upon the execution of the undertaking provided for in § 5529, 45 O. S. 222. In the absence of a levy so made the court acquires no jurisdiction over the property sought to be attached, and it may be taken in execution or attachment by any other creditor, as if no previous writ had been issued, *Id.*

§ 5529. When property attached may be delivered to the persons with whom found. The sheriff shall deliver

the property attached to the person in whose possession it was found, upon the execution by such person, in the presence of the sheriff, of an undertaking to the plaintiff, with sufficient surety, resident in the county, to the effect that the parties to the same are bound, in double the appraised value of the property, that the property, or its appraised value in money, shall be forthcoming to answer the judgment of the court in the action; but if it appear to the court that any part of such property has been lost or destroyed by unavoidable accident, the value thereof shall be remitted to the person so bound. [51 v. 57, § 199; S. & C. 1005.]

The action must be brought in the court where the attachment issued, 2 D. 73. Several attaching creditors may join in the action; their several rights, 10 O. S. 478. Under § 5528 it is the interest of the defendant that is to be appraised, and the penalty of the bond under this section will only be double that interest, and not double the value of the whole property attached, if partnership property, 1 H. 22. The undertaking to perform the judgment of the court in the action has reference to the final order and direction of the court in that case, and does not necessarily intend payment or delivery directly to the plaintiff in attachment, 2 D. 73. The undertaking is valid though no appraisal is had, and the security is approved by the sheriff instead of the court, 1 W. L. M. 42. The execution of the redelivery bond is no bar to an action on the attachment undertaking, 23 O. S. 358; see 24 Kas. 580; 3 C. C. R. 212; 45 O. S. 222. Undertaking may be executed in vacation in presence of sheriff instead of court, 15 O. S. 200. Defendant has a right to furnish a redelivery bond for the whole or a part of the property attached, 3 C. C. 432; generally, 51 O. S. 6.

§ 5530. Proceedings against garnishee. Service. When the plaintiff, his agent or attorney, makes oath, in writing, that he has good reason to believe, and does believe, that any person, partnership, or corporation, in the affidavit named, has property of the defendant in his possession, describing the same, if the officer can not get possession of such property, he shall leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court and answer, as provided in § 5547; and if the garnishee does not reside in the county in which the order of attachment was issued, the process may be served by the proper officer of the county in which the garnishee resides, or may be personally served. [78 v. 93; 74 v. 160, § 200.]

"Any person" includes a guardian, 9 Bull 64; "corporation," a foreign railroad company, 31 O. S. 537. A corporation may attach the interest of its own stockholder by service of process upon itself, 43 O. S. 509. "Partnership" may be garnished in its firm name, 18 O. S. 134 (so held before the word "partnership" was added to the statute by the last amendment); but a

debt due to a firm can not be garnished to pay claim against a partner, 29 O. S. 120. Amount due on a promissory note can not be garnished, 34 O. S. 158; nor can money in the hands of administrator before order of distribution, 5 Bull 288. Where process of garnishment is served upon one who is indebted to defendant on notes secured by mortgage and judgment rendered for plaintiff, the notes and mortgage are, in legal effect, assigned to the plaintiff and he may foreclose whatever be the answer of the garnishee, 45 O. S. 653. The plaintiff may foreclose the mortgage and proceed against the garnishee for unsatisfactory answer in the same action, *Id.* Garnishment of maker of promissory note, 2 N. P. 108.

§ 5531. Effect of service of process of garnishment on public officer. The service of process of garnishment upon the sheriff, coroner, clerk, constable, master commissioner, marshal of a municipal corporation, or other officer having in his possession any money, claim, or other property of the defendant, or in which the defendant has an interest, shall bind the same from the time of such service, and shall be a legal excuse to such officers, to the extent of the demand of the plaintiff, for not paying such money or delivering such claim or property to the defendant, as by law, or the terms of the process in his hands, he would otherwise be bound to do. [74 v. 160, § 200.]

In order to attach property held by an officer under legal process, he must be proceeded against as a garnishee; it is not sufficient, in order to bind the officer or the property, that he be merely notified by the officer holding the writ of attachment that he holds the same, and by virtue of it attaches the property, 19 O. S. 587. Under a former statute it was held that money received by a sheriff on execution could not be attached in his hands, 1 O. 275.

§ 5532. Where garnishee to answer and be examined. The answer of the garnishee shall be made before the clerk of the court of common pleas of the county in which he resides, or, if he resides out of the state, before the clerk of the court of common pleas of the county where he was served, or where the action is pending; a special examination of the garnishee shall be had; and actions against him under § 5551 shall be brought in the county in which he resides. [74 v. 160, § 200.]

Garnishee should aver readiness to pay, 2 Clev. R. 97; may object to action against foreign firm in firm name, 2 Bull. 97; may set up as a good defense attachment in another state, 25 O. S. 347, or former garnishment, 2 Bull 94; but not payment by his wife in his absence, 25 O. S. 320; nor a right of exemption in the defendant, *Id.*, though the defendant may be made a party and claim the exemption, 36 O. S. 545. His answer does not discharge him, but leaves him liable to be sued by plaintiff, 29 O. S. 120; 31 O. S. 537. Court may appoint commissioner to examine garnishee, 18 O. S. 134; see 45 O. S. 653; under § 5530 and § 5551a.

§ 5533. Clerk to transmit answer to proper court. The clerk of the court of common pleas before whom the answer is made, shall transmit the same to the clerk of the court in which the suit is pending, in the same manner as depositions are required to be directed and transmitted, and shall receive for his services such fees as are allowed by law for taking depositions, and to clerks for furnishing certificates, with their seals of office attached; and if the garnishee admit an indebtedness to the defendant, and the court order the payment of the same, or any part thereof, to the plaintiff, and the garnishee fail to pay the same according to such order, execution may issue thereon as upon judgments for the payment of money. [74 v. 160, § 200.]

Under the justice's code the order of the justice is not a judgment charging the garnishee, and can only be enforced by action against him, 89 O. S. 218, and not by execution, as under this section; see 12 O. S. 358, 359; 2 D. 86; 2 H. 1.

§ 5534. How garnishee served. If the garnishee is a person, the copy of the order and notice shall be served upon him personally, or left at his usual place of residence; if a partnership garnisheed by its company name, they shall be left at its usual place of doing business (1), and if a corporation they shall be left with the president or other principal officer, or the secretary, cashier, or managing agent (2) thereof; and if such corporation is a railroad company, they may be left with any regular ticket or freight agent thereof, in any county in which the railroad is located (3). [78 v. 93; 65 v. 213, § 201; S. & S. 552.]

1. 18 O. S. 184. 2. A foreign insurance company may be made a garnishee by serving copies of the order of attachment and notice upon the managing agent of such company, 15 Bull 333, 28 Bull 246; distinguishing 2 D. 1, where an attempt was made to serve an insurance company located in Cleveland by delivering a copy of the order of attachment to an agent in Cincinnati, and it was held that the only proper mode to serve the company would be by an order of attachment issued to Cuyahoga County. 3. Foreign railroad company operating in this state served in the same manner as a domestic corporation, 31 O. S. 537.

§ 5535. Different attachments on same property made by same officer. Different attachments of the same property may be made by the same officer; and one inventory and appraisement shall be sufficient, and it shall not be necessary to return the same with more than one order. [51 v. 57, § 202; S. & C. 1006.]

Subsequent attaching creditors can not be made parties because of interest in the attached property, and can not rely on informalities or irregularities in the proceedings, 9 O. S. 338; 12 O. S. 158; and where an equity of redemption is attached, the mortgagee is not a proper party, 33 O. S. 254. While different attachments of the same property may be made by the same officer, personal property held under attachment by one officer can not be levied upon under a writ in the hands of another officer. In order to attach the property in the hands of the sheriff, he should have been proceeded against as a garnishee. His assent to the so-called levy did not change the rule, 46 O. S. 557.

§ 5536. How subsequent attachments made. When the property is under attachment, attachments on the same under subsequent orders shall be as follows:

1. If it is real property, it shall be attached in the manner prescribed in § 5528.

2. If it is personal property, it shall be attached as in the hands of the officer, and subject to any previous attachment.

3. If a person be made a garnishee more than once with respect to the same indebtedness or liability, a copy of the order and notice shall be left with him, in the manner prescribed in § 5530. [51 v. 57, § 203; S. & C. 1006.]

§ 5537. Form of return. The officer shall return upon every order of attachment what he has done under it, and the return must show the property attached, and the time it was attached; when garnishees are served, their names, and the time each was served, must be stated; and the officer shall return with the order all undertakings given under it. [51 v. 57, § 204; S. & C. 1006.]

The return should show that the property attached belonged to defendant, 13 O. 209, 219; it is conclusive as between parties and privies of facts stated, until set aside, and as to third persons *prima facie* evidence of such facts, 14 O. S. 240; it may be amended, but not to affect prior levies or liens, 13 O. 220, and an amendment only operates against third persons from its date, *Id.*

§ 5538. When property and garnishee bound. An order of attachment shall bind the property attached from the time of service; and the garnishee shall stand liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice mentioned in § 5530 (1); but when property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment (2). 51 v. 57, § 205; S. & C. 1006.]

1. 21 O. S. 221. Levy of order of attachment, without process of garnishment, has no greater operation than levy of execution, 38 O. S. 76. Garnishee not necessarily exempt from liability to pay interest to defendant in attachment during pendency of proceedings, 9 O. S. 452. See 1 N. P. 198. 2. Assignee of certificate of deposit preferred to attaching creditor, 11 O. S. 449; and pledgee of bank stock, 43 O. S. 509; mortgagee of personal property, 18 O. S. 184; mechanic's lien superior to attachment, 1 Bull 302. Levy on land giving prior equity, 18 O. S. 422.

SUBDIVISION IV. DISPOSITION OF ATTACHED PROPERTY.

§ 5539. Receiver may be appointed. The court, or a judge thereof in vacation, may, on the application of the plaintiff, and on good cause shown, appoint a receiver, who shall take an oath, and give an undertaking, as is provided in other cases. [51 v. 57, § 206; S. & C. 1007.]

§ 5540. Duties and powers of receiver. The receiver shall take possession of all notes, due bills, books of account, accounts, and all other evidences of debt, that have been taken by the sheriff or other officer as the property of the defendant in attachment, and shall proceed to settle and collect the same, and for that purpose he may commence and maintain actions in his own name, as such receiver; but in such actions no right of defense shall be impaired or affected. [51 v. 57, § 207; S. & C. 1007.]

In case an order of attachment is sent to another county, and evidences of indebtedness are there taken, a receiver appointed here may take possession of such evidences of indebtedness, and proceed to collect them as in any other case, 2 H. 204.

§ 5541. Notice of receiver's appointment. The receiver shall forthwith give notice of his appointment to the persons indebted to the defendant in attachment, which notice shall be written or printed, and shall be served on the debtor by copy personally, or by copy left at his residence; and, from the date of such service, the debtors shall stand liable to the plaintiff in attachment for the amount of money and credits of the defendant in attachment in their hands, or due from them to him, and shall account therefor to the receiver. [51 v. 57, § 208; S. & C. 1007.]

§ 5542. Report of receiver. The receiver shall, when required, report his proceedings to the court, and hold all money collected by him, and property which may come into his hands, subject to the order of the court. [51 v. 57, § 209; S. & C. 1007.]

§ 5543. When attaching officer to act as receiver. When a receiver is not appointed, the officer who at-

taches the property shall have all the powers, and perform all the duties, of a receiver appointed by the court or a judge, and may, if necessary, commence and maintain actions in his own name, as such officer; and he may be required to give security other than his official undertaking. [51 v. 57, § 210; S. & C. 1007.]

§ 5544. **How attached property disposed of.** The court, or a judge thereof in vacation, may make proper orders for the preservation of the property during the pendency of the suit, and may direct a sale of property when, because of its perishable nature, or the cost of keeping it, a sale will be for the benefit of the parties; the sale shall be public, after such advertisement as is prescribed for the sale of like property on execution, and shall be made in such manner, and upon such terms of credit, with security, as the court or judge, having regard to the probable duration of the action, may direct; and the sheriff shall hold and pay over all proceeds of the sale collected by him, and all money received by him from garnishees, under the same requirements and responsibilities of himself and sureties as are provided in respect to money deposited in lieu of bail. [51 v. 57, § 211.]

Pending error application should be made to court where property attached, 21 Bull 413. Costs and expenses of storage, or for other care of property, are a proper charge on the fund arising from the sheriff's sale of the property. There is no provision authorizing a personal judgment against the plaintiff for the amount of such expenses, 1 D. 571.

SUBDIVISION V. PROCEEDINGS UPON ATTACHMENT.

§ 5545. **How attachment discharged.** If the defendant, or other person on his behalf, at any time before judgment, cause an undertaking to be executed to the plaintiff, by sufficient surety resident in the county, to be approved by the court, in double the amount of the plaintiff's claim as stated in his affidavit, to the effect that the defendant shall perform the judgment of the court, the attachment shall be discharged, and restitution made of any property taken under it, or the proceeds thereof; and such undertaking shall also discharge the liability of a garnishee in the action, for any property of the defendant in his hands: provided that when plaintiff's claim is for causing death or a personal injury by a negligent or wrongful act, the undertaking required shall be in such amount as shall be fixed by the court where the action is pending, or a judge thereof, if application is made in vacation. [92 v. 327.]

The undertaking supersedes all proceedings under the attachment, and a garnishee who had been served with process,

and answered after the undertaking had been given, should, on application of defendant, be discharged, 29 O. S. 120. The defendant in attachment can not ask the discharge of the garnishees on the ground that their answer fails to show that they have property of the defendant in their hands subject to garnishment. The plaintiff is not concluded by the answer of the garnishees, and if the disclosures in their answer are not satisfactory to him he is authorized to proceed against them by action on that ground, Id. The giving of a discharge bond by the defendant after he has filed a petition in error seeking the reversal of an order overruling his motion to discharge the attachment will not defeat his right to further prosecute his petition in error, 3 C. C. 209. The undertaking authorized by this section is intended to take the place of the attachment proceeding, and the property seized by virtue of the writ. It is the intent of the statute that the sureties shall be bound to the same extent (not in excess of the amount of the undertaking) as the property of the debtor, or the garnishees, would have been bound, had no undertaking been given, 47 O. S. 262. The giving a discharge bond by defendant in attachment does not operate as a waiver of prior defects in such proceedings nor deprive him of the right to move to discharge such attachment, 7 C. C. 51. How far section operates, 51 O. S. 6.

§ 5546. Id. Undertaking may be given in vacation. The undertaking mentioned in the preceding section may, in vacation, be executed in the presence of the officer having the order of attachment in his hands, or, after the return of the order, before the clerk, with the same effect as if executed in court, the sureties, in either case, to be approved by the officer before whom the undertaking is executed. [51 v. 57, § 213; S. & C. 1008.]

15 O. S. 200.

§ 5547. Garnishee shall appear and make disclosure. The garnishee shall appear and answer within the time, after the written notice is issued as provided in § 5530, as is allowed the defendant or defendants to answer the petition upon which the attachment was granted; and he shall answer, under oath, all questions put to him touching the property of [every] description, and credits of the defendant, in his possession or under his control, and he shall disclose truly the amount owing by him to the defendant, whether due or not, and, in the case of a corporation, any stock held therein by or for the benefit of the defendant, at or after the service of notice. [90 v. 175; 89 v. 46; 51. v. 57, § 214; S. & C. 1008.]

"In the case of a corporation, any stock," etc.; see 43 O. S. 509, 522. The amendment of 89 v. 46 provided that the garnishee should be entitled to demand his fees as other witnesses and if not paid he should not be bound to obey the notice. See, generally, 51 O. S. 6, 14.

§ 5548. **Garnishee may pay money into court or to attaching officer.** A garnishee may pay the money owing to the defendant by him to the officer having the order of attachment, or into court; he shall be discharged from liability to the defendant for any money so paid, not exceeding the plaintiff's claim, and shall not be subjected to costs beyond those caused by his resistance of the claim against him; and if he disclose the property in his hands, or the true amount owing by him, and deliver or pay the same according to the order of the court, he shall be allowed his costs. [51 v. 57, § 215; S. & C. 1008.]

§ 5549. **Attachment of garnishee for contempt on failure to answer.** If the garnishee fail to appear in court and answer, as required by § 5547, the court may proceed against him by attachment as for a contempt. [51 v. 57, § 216; S. & C. 1008.]

§ 5550. **Disposition of property in hands of garnishee.** If the garnishee appear and answer, and it be discovered on his examination, that at or after the service of the order of attachment and notice upon him, he was possessed of any property of the defendant, and was indebted to him, or either, the court may order the delivery of such property, and the payment of the amount owing by him, into court, or either; or the court may permit the garnishee to retain the property, or the amount owing, upon the execution of an undertaking to the plaintiff, by sufficient surety, to the effect that the amount shall be paid, or the property forthcoming, as the court may direct. [51 v. 57, § 217; S. & C. 1008.]

An order will not be made requiring the garnishee to pay the current weekly wages of the defendant not due at the time of the service of the attachment, but which became due afterward; much less subsequent wages paid in advance by the garnishee to the defendant as the only condition on which he would continue in his employment, 2 D. 87.

§ 5551. **When plaintiff may have action against the garnishee.** If the garnishee fail to appear and answer, or if he appear and answer, and his disclosure be not satisfactory to the plaintiff, or if he fail to comply with the order of the court to deliver the property and pay the money owing into court, or to give the undertaking required in the last section, the plaintiff may proceed against him by civil action; and thereupon such proceedings may be had as in other actions, and judgment

may be rendered in favor of the plaintiff for the amount of property and credits of every kind of the defendant in possession of the garnishee, and for what may appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee. [51 v. 57, § 218.]

Petition in error will not lie to review order of justice requiring garnishee to pay into court money of defendant in attachment, 9 C. C. 139.

The right of action against a garnishee, under this section, passes by an assignment of the judgment obtained against the defendant in attachment, 18 O. S. 134 (see 5 Bull 441). An action under this section to enforce against a partnership a liability arising under its provisions may be brought against the partnership, either in the name of the firm or in the names of the persons who compose it, 18 O. S. 134. Plaintiff can not have an action under this section when the court did not have jurisdiction of the defendant in attachment, 24 O. S. 481; and plaintiff can not have an action against the garnishee on the ground of non-residence, though the garnishee may appear and answer, 26 O. S. 645; 31 O. S. 537; 2 Bull 76. Where one of the defendants in an action on a joint contract dies before judgment is taken against all the defendants, without any suggestion of his death, or making his representatives parties, such judgment is not void, but merely voidable, and is a determination of the action within the meaning of §§ 5551-5553, 24 O. S. 87. An attachment will not be discharged on the ground that it appears from the answer of the garnishee that he is indebted and has no property in his possession belonging to the defendant 31, O. S. 537. Where in proceedings in attachment the process of garnishment is served upon one who is indebted to the defendant upon notes secured by mortgage and judgment is rendered for the plaintiff, the notes are in legal effect assigned to the plaintiff and he may maintain an action to foreclose the mortgage, and this is so, whether the garnishee admits or denies the indebtedness in his answer; if it is denied, the plaintiff may proceed against him for an unsatisfactory answer and the foreclosure of the mortgage in the same action, 45 O. S. 653. Garnishees answered that they owed the defendant nothing, that defendant held their note, but that he alleged he had transferred it to a third party. If the plaintiff disputes the fact of the transfer his remedy is by action under this section as in other cases when he is not satisfied with the answer of the garnishee, 2 C. S. C. R. 56.

§ 5552. When plaintiff to pay costs, and defendant may be substituted for plaintiff. If the plaintiff proceed against the garnishee by action, for the cause that his disclosure was unsatisfactory, unless it appear in the action that such disclosure was incomplete, he shall pay costs of such action; and when the claim of the plaintiff in attachment is satisfied, the defendant may, on motion, be substituted as the plaintiff in the judgment. [51 v. 57, § 218; S. & C. 1009.]

§ 5553. When judgment may be rendered against garnishee, and when he must be discharged. Final judg-

ment shall not be rendered against the garnishee until the action against the defendant in attachment is determined (1); if in such action judgment be rendered for the defendant in attachment, the garnishee shall be discharged, and recover costs; and if the plaintiff recover against the defendant in attachment, and the garnishee deliver up all the property and credits of the defendant in his possession, and pay all the money due from him, as the court may order, the garnishee shall be discharged, and the costs of proceedings against him shall be paid out of the property and money so surrendered, or as the court deems right and proper. [51 v. 57, § 219; S. & C. 1009.]

1. 2 H. 1; see § 5545n. Entering it before only a clerical error, 13 O. S. 219; see 5551n.

§ 5554. **Effect of judgment for defendant.** If judgment in the action be rendered for the defendant, the attachment shall be discharged, and the property attached, or its proceeds, shall be returned to him. [51 v. 57, § 220; S. & C. 1009.]

§ 5555. **Proceedings after judgment for plaintiff.** If judgment be rendered for the plaintiff, it shall be satisfied as follows: So much of the property remaining in the hands of the officer, after applying the money arising from the sale of perishable property, and so much of the personal property, and lands and tenements, if any, whether held by legal or equitable title, as may be necessary to satisfy the judgment, shall be sold by order of the court, under the same restrictions and regulations as if the same had been levied on by execution; and the money arising therefrom, with the amount which may be recovered from the garnishee, shall be applied to satisfy the judgment and costs; if there be not enough to satisfy the same, the judgment shall stand, and execution may issue thereon for the residue, in all respects as in other cases; and any surplus of the attached property, or its proceeds, shall be returned to the defendant. [51 v. 57, § 221; S. & C. 1009.]

9 C. C. 311.

§ 5556. **Court may enforce delivery of property attached by proceedings for contempt.** The court may compel the delivery to the sheriff, for sale, of any of the attached property for which an undertaking has been given, and may proceed summarily on such undertaking to enforce the delivery of the property, or the payment of the

money due upon the undertaking, by rules and attachment as in cases of contempt. [51 v. 57, § 222; S. & C. 1010.]

§ 5557. **Court may order officer to repossess himself of attached property.** The court may order the officer to repossess himself, for the purpose of selling it, of any of the attached property which has passed out of his hands without having been sold or converted into money; and the officer shall, under such order, have the same power to take the property as he would have under an order of attachment. [51 v. 57, § 223; S. & C. 1010.]

§ 5558. **When property attached is claimed by a third person.** If personal property which has been attached be claimed by any person other than the defendant, the officer shall have the validity of such claim tried; and such proceedings must be had thereon, with the like effect, as if the property had been seized upon execution, and claimed by a third person. [51 v. 57, § 224; S. & C. 1010.]

See §§ 5444-5446*nn*.

§ 5559. **When question of priority may be referred.** When several attachments are executed on the same property, or the same person is made a garnishee by several parties, the court, on the motion of any of the plaintiffs may order a reference to ascertain and report the amounts and priorities of the several attachments. [51 v. 57, § 225; S. & C. 1010.]

The rights of attaching creditors may properly be determined upon a motion for a distribution of the fund as well as by a reference under this section, 2 C. C. 110, 114. See 10 C. C. 658.

SUBDIVISION VI. GENERAL PROVISIONS.

§ 5560. **Proceedings not to terminate by death of defendant.** From the time of the issue of the order of attachment the court shall be deemed to have acquired jurisdiction (1), and to have control, of all subsequent proceedings under this chapter; and if, after the issue of the order, the defendant, being a person, die, or being a corporation, its charter expire by limitation, forfeiture, or otherwise, the proceedings shall be carried on; but in all such cases, other than where the defendant was a foreign corporation, the legal representatives of the defendant shall be made parties to the action. [51 v. 57, § 226; S. & C. 1010.]

1. 41 O. S. 271, 272.

§ 5561. When plaintiff may be required to give further security. The defendant may, at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff; and if, on such motion, the court is satisfied that the surety in the plaintiff's undertaking has removed from the state, or is not sufficient for the amount of the undertaking, it may vacate the order of attachment, and direct restitution of any property taken under it, unless, in a reasonable time, to be fixed by the court, sufficient security be given by the plaintiff. [51 v. 57, § 227; S. & C. 1010.]

§ 5562. Motion to discharge attachment. The defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment, as to the whole or any of the property attached; and the motion may be heard and decided by the court at any term or regular session thereof, or it may be made, heard, and decided by any judge thereof in vacation. [54 v. 29, § 228; S. & C. 1011.]

Defendant in attachment can not move the court to dismiss the attachment on the ground that the property attached does not belong to him, 10 O. S. 439; and an attachment will not be discharged on the ground that it appears from the answer of the garnishee that he is not indebted, and has no property in his possession belonging to the defendant, 31 O. S. 537. On motion to discharge an attachment for insufficient affidavit, the court will not look into the petition and exhibits, 1 H. 45. On the hearing of a motion to discharge an attachment issued on an insufficient affidavit, it is not competent for the plaintiff, in the absence of leave to amend, or a motion for such leave, to supplement the affidavit or validate his proceedings by new affidavits showing the existence of fraud in fact, 23 O. S. 192. The proper mode for defendant to meet the charge made in an affidavit for attachment is by motion, 9 O. S. 388. Appearance by motion solely for the purpose of dismissing an attachment is not an appearance in the action, 39 O. S. 249. The provisions of this section are made applicable to proceedings before justices of the peace by the justices' code, 29 O. S. 538. Procedure on motion to discharge attachment in action before justice of the peace, 34 O. S. 11, § 6522, *et seq.* An order of a justice overruling a motion to discharge an attachment is reviewable on error as a final order, independent of the action in which the attachment issued, 42 O. S. 102. When a creditor of a non-resident debtor fraudulently and without his knowledge causes his property to be brought into the state to be attached, the attachment will on motion under this section be discharged, 19 Bull 257.

§ 5563. Evidence on motion to discharge. When the motion is made upon affidavits on the part of the defendant, or papers and evidence in the case, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to the evidence on which the order of attachment was made. [51 v. 57, § 229.]

Sufficiency of petition not considered, 35 Bull 120.

See 2 D. 394; 34 O. S. 11; 20 Bull 388; 46 O. S. 52.

§ 5563a. Party affected by order may file petition in error. A party to a suit affected by an order discharging or refusing to discharge an order of attachment, may file a petition in error to reverse, vacate, or modify the same, as in other cases; and the original action shall proceed to trial and judgment in every respect, as though no petition in error had been prosecuted. [77 v. 69.]

An order discharging an attachment is a final order, reviewable on error, 5 O. S. 42; 9 O. S. 388; 11 O. S. 579. A motion for a new trial is not necessary in order that the action of the court upon the motion discharging the attachment may be reviewed on error, 12 Bull 321; 8 C. C. 636. The reviewing court will not reverse the action of the lower court upon a motion to discharge an attachment where questions of fact are involved, unless the action of the lower court was clearly erroneous, *Id.* In action before justice of the peace, see § 6524. The giving of a discharge bond by the defendant in an attachment proceeding after he has filed a petition in error seeking the reversal of an order overruling his motion to discharge the attachment will not defeat his right to further prosecute his petition in error, 3 C. C. 209. Cited in 9 C. C. 311.

§ 5563b. *Id.* Time for filing petition in error. Bond. When an order discharging an order of attachment is made, and a party affected thereby excepts thereto, the court or judge shall fix the number of days, not to exceed thirty, in which such party may file his petition in error, and during which it shall be filed, and the attached property held by the sheriff or other officer; the party who files the petition in error shall give an undertaking to the adverse party, with surety to be approved by the clerk of the circuit court, in double the amount of the appraised value of the property attached, conditioned to pay such adverse party all damages sustained by him in consequence of the filing of the same, in the event of the discharge of the order of attachment by the court in which the petition in error is filed, because the same was wrongfully obtained; and when such petition in error is filed, and an undertaking given, the sheriff, or

other officer, shall continue to hold the property attached, subject to the further order of the court. [84 v. 13; 77 v. 70.]

The limitation of time for filing petitions in error under these sections is solely for the purpose of retaining the attached property; and in order that the lien on such property may be retained, the petition in error must be filed and bond given within the time prescribed by the trial court, 12 Bull 308. Proceedings before justice, filing petition in error and bond, in case of an order of a justice of the peace discharging an order of attachment, see § 6525.

§ 5563c. *Id.* Administrator or executor may file petition in error. If a party who excepts to an order discharging or refusing to discharge an order of attachment die within the time limited for filing his petition in error, the administrator or executor of such deceased party may, at any time within thirty days after his appointment and qualification, file his petition in error, and thereby become a party to the action, and shall not be required to give the undertaking required by the preceding section; but no such petition in error shall be filed by an executor or administrator after one year from the time such order is made. [77 v. 70.]

CHAPTER III.

ATTACHMENT BEFORE DEBT DUE.

§ 5564. Grounds of attachment before debt due. A creditor may bring an action on his claim before it is due, and have an attachment against the property of the debtor:

1. When a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; or,

2. Is about to make such sale, conveyance, or disposition of his property, with such fraudulent intent; or,

3. Is about to remove his property, or a material part thereof, with the intent, or to the effect, of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts. [51 v. 57, § 230.]

Proceedings before justice of the peace, see § 6515.

See § 5521. Attachment lies against indorser of note not due, 1 H. 442; but the operation of the section is not restricted to contracts for the payment of money, 12 O. S. 158. An obligation to deliver on and after a certain day, iron metal in payment at a rate agreed on for iron ore sold and delivered constitutes a claim

for which an action may be brought, and an order of attachment obtained before the claim becomes due, *Id.* To justify the attachment, the fraudulent intent to injure the creditor or secure some benefit to the debtor must appear *actually to exist*; it is not necessarily sufficient proof of that intent that it appears that *the actual*, or even *the necessary* consequences of the sale are to hinder and delay creditors, 1 D. 351. An affidavit stating the ground for an attachment substantially in the language of the statute may be sufficient, 9 O. S. 388. It is error for the court of common pleas to discharge an attachment which had been allowed by the proper judge, in an action by sureties to obtain indemnity, on the ground of the insufficiency of the affidavit, 11 O. S. 579.

§ 5565. **Who to grant attachment. Affidavit.** The attachment authorized by the last section may be granted by the court in which the action is brought, or by a judge thereof; but before such action shall be brought, or such attachment granted, the plaintiff, or his agent or attorney, shall make an oath, in writing, showing the nature and amount of the plaintiff's claim, that it is just, when it will become due, and the existence of any one of the grounds for attachment enumerated in the last preceding section. [51 v. 57, § 231; S. & C. 1011.]

See § 5522n.

§ 5566. **Action to be dismissed, if attachment refused.** If the court or judge refuse to grant an order of attachment, the action shall be dismissed, but without prejudice to a future action; and in all such actions application for an attachment must be made. [51 v. 57, § 232; S. & C. 1011.]

1 D. 569.

§ 5567. **Order must specify amount.** The order of the court or judge granting the attachment shall specify the amount for which it is allowed, not exceeding a sum sufficient to satisfy the plaintiff's claim and the probable costs of the action. [51 v. 57, § 233; S. & C. 1012.]

§ 5568. **Bond to be executed before order issues.** The order of attachment, as granted by the court or judge, shall not be issued by the clerk until there is executed in his office such undertaking on the part of the plaintiff as is directed by § 5523. [51 v. 57, § 234; S. & C. 1012.]

§ 5569. **No judgment before debt is due.** The plaintiff in such action shall not have judgment on his claim before it becomes due; and the proceedings on attachment may be conducted without delay. [51 v. 57, § 235; S. & C. 1012.]

Where an order of attachment has been allowed and issued before the debt is due, and it is subsequently discharged, it is a matter of discretion with the court whether the action shall be dismissed or allowed to proceed after the debt becomes due. It is proper to dismiss it unless special reasons to the contrary are shown, 1 D. 569.

§ 5570. Application of provisions of preceding chapter. Proceedings authorized by the next preceding chapter shall govern attachments under this chapter, so far as the same are applicable. [54 v. 29, § 236; S. & C. 1012.]

CHAPTER IV.

INJUNCTIONS.

§ 5571. Injunction defined. The injunction provided by this title is a command to refrain from a particular act; it may be the final judgment in an action, or may be allowed as a provisional remedy; and when so allowed, it shall be by order. [51 v. 57, § 237; S. & C. 1012.]

§ 5572. Causes for an injunction. When it appears by the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce great or irreparable injury to the plaintiff, or when, during the litigation, it appears that the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, a temporary order may be granted restraining such act; and such order may also be granted in any case where it is specially authorized by statute. [51 v. 57, § 238; S. & C. 1013.]

The power to grant writs of injunction is one of the extraordinary powers of a court of equity and should only be exercised in cases where a great and important public work is to be restrained or suspended, to prevent injuries which would otherwise be irreparable, or when the magnitude of the injury to be dreaded is so great, and the risk so imminent, that no prudent person would think of incurring it, 14 O. 353, 358; nor in such cases should the court interfere where the plaintiff's right is doubtful, or where an action at law or in equity, prosecuted in the ordinary mode, will afford adequate redress, *Id.* An action to enjoin is not prematurely brought where defendant has made no threats or declarations of intention to act, if there is good

reason to believe that the defendant will proceed to act and complete measures then in progress for such act, 26 O. S. 618, 625.

Accounting only incidental to injunction, and not allowed if injunction refused, 2 O. S. 180.

Action at law, injunction in aid of, 2 Clev. R. 355, to prevent disposition of property pending action, 1 W. L. M. 571; 5 W. L. J. 467; 10 Id. 83; but not allowed if there is a legal defense, 4 Bull 1149; W. 315.

Appeal dissolves injunction, 17 O. S. 144; W. 508. Appeal does not lie from interlocutory order modifying injunction, 1 C. C. R. 417. Injunction may be allowed in case pending in circuit court on appeal, 2 O. S. 498.

Appropriation of property enjoined, 5 O. 139; 17 O. 340; 12 O. S. 635, 642; construction of railroad, 38 O. S. 41; of sewer, 5 Bull 789, enjoined until land condemned. Expending money on ditch enjoined until land condemned, 39 O. S. 53; waiver of right, 22 O. S. 275; 18 O. S. 169.

Assessment enjoined for improvement of, 16 O. 574, and opening street, 27 O. S. 649; right to enjoin ditch assessment lost by delay, 15 O. S. 64. See §§ 2264, 5848.

Attachment. Allowed against prosecution of attachment in another state to subject exempt wages, 25 O. S. 516; 23 C. L. J. 268, 274.

Bid. City council having rejected all bids can not be compelled by injunction to accept one because the lowest, 10 Bull 345.

Board of education can not enjoin collection of tax for district established by probate court, 39 O. S. 259.

Boundary. In case of disputed boundary, 33 O. S. 537.

Burden of proof is upon the party claiming injunction, and he must show a clear right thereto, 43 O. S. 526.

Contract. To enjoin breach of negative contract or covenant, 25 O. S. 580; 13 O. S. 544, 550; 2 C. C. R. 286; but not to enforce contract *ultra vires*, 38 O. S. 24.

Counter-claim, § 5586.

County auditor, after term of office, can not enjoin commissioners from filling a vacancy, 2 C. C. R. 23.

Damages. Injunction lies where cause of action is continuous, and damages not assessable by jury, 25 O. S. 580, 584.

Dismissal of petition dissolves injunction, 11 Bull 295; dismissal before answer filed erroneous, 35 O. S. 444; dismissal without prejudice not breach of condition of bond, 44 O. S. 221. See § 5576n.

Dissolution on motion, 35 O. S. 444. Error lies, 45 O. S. 631.

Electric light poles. Erection of electric light poles enjoined, 9 Bull 65; near telegraph poles, 14 Bull 327.

Estoppel by delay and acquiescence, 18 O. S. 169; 22 Id. 275; 15 Id. 64; 26 Id. 346; 33 Id. 271; 36 Id. 601; 1 C. C. R. 100.

Execution erroneously issued to be enjoined, 26 O. S. 291; on land contracted to be sold, 24 O. S. 28; on property secured to wife by ante-nuptial contract, 4 O. S. 241; to prevent waste, 1 W. L. M. 270. Not allowed against execution for mere irregularities, 16 O. 419.

Forfeiture. Not allowed to enforce forfeiture, 10 O. S. 411.

Fraudulent conveyance. Allowed to prevent fraudulent conveyance, W. 61, 492.

Heirs enjoined from collecting widow's third of rents, 11 O. S. 120.

Irreparable injury. Facts showing irreparable injury must be stated, 81 O. S. 420.

Joinder of parties. See § 5005, notes.

Judgment. To enjoin judgment fraudulently entered, see 4 Bull 289; to enjoin sale under void judgment, 21 O. S. 142. Petition to enjoin judgment on ground of illegal interest must show tender of amount equitably due, 11 O. 417. Injunction not allowed against judgment where defense at law was practicable, 2 O. 7, 20, 22, 23; 3 O. 268; 4 O. 469; 26 O. S. 291; nor against judgment by compromise of attorneys, 2 C. S. C. R. 490. Injunction against judgment does not operate as a release of errors, 3 O. 20; operates on parties, 10 O. 268. Sheriff is not a proper party to injunction against judgment in absence of fraud, 14 O. 445; 10 O. 268; 1 C. S. C. R. 259. Not allowed because of errors in proceedings, 45 O. S. 495. Pleading, 43 O. S. 78, 86.

Lessee enjoined from increasing risk of insurance company, 2 C. S. C. R. 6. Tenant not enjoined from exclusive use of sign space, 17 Bull 242.

Libel. Not allowed to restrain publication of anticipated libel, 13 Bull 335. See 24 Bull 189; 1 N. P. 266.

Mandamus not allowed to compel violation of injunction, 7 O. S. 278.

Mandatory injunction. 4 O. 368; 6 O. S. 120; 13 O. S. 544; 37 O. S. 520; 4 Bull 156; Id. 500; 2 N. P. 317; 2 Bull 17; 2 C. S. C. R. 60; to compel gas company to furnish gas, 47 O. S. 1.

Municipal corporation. Enjoining misapplication of funds of municipal corporation, §§ 1777, 1778; see § 4993, notes; enjoining collection of taxes, §§ 5848-5851; enjoined from closing variety show, 6 Bull 139; not enjoined from removing market, 18 O. S. 563, nor from publishing ordinance in several papers, 2 C. S. C. R. 84; nor from enforcing ordinance prohibiting sale of liquor, 3 C. C. 545.

Natural gas pipes. See Nuisance.

Negligence bars right, 6 O. 80; 10 Rec. 564.

Non-resident lot owner may enjoin construction of railroad in front of premises, 19 O. S. 78.

Nuisance enjoined. Erection of electric light poles, 9 Bull 65; telegraph or telephone lines, 12 Bull 104; 2 C. C. R. 259; sinking natural gas well, injunction by coal owner against surface owner, 14 Bull 112; laying natural gas pipes in streets, 16 Bull 121; manufacturing fertilizer, 10 Bull 342; taking down party wall, 9 Bull 293; obstructing navigable river, 23 O. S. 523. Supervisor can not enjoin obstruction of road, 5 O. 187; allowed against operation of "roller coaster" on Sundays and after 9 P. M. on week days, 14 Bull 224; against nuisance by sewage, 2 Bull 135; not allowed to restrain sale of adulterated teas, 14 Bull 215, nor to enjoin exclusive use of sign space by one of several tenants having prior possession, 17 Bull 242; steam power and machinery, 33 O. S. 271; brick-kiln, 26 Bull 36.

Parties. §§ 5005, 5006nn.

Partnership name enjoined from being used on application of retiring partner, 22 O. S. 370; by retiring partner, 29 Bull 100, 50 O. S. Injunction restraining co-partners from engaging during term of partnership contract in competing business, 9 Bull 92. Sale on execution against one partner, 18 Q. 181; 16 O. 142.

Personal services. When court of equity will control personal conduct of party by injunction, 13 O. S. 544; 12 Bull 209. See 25 Bull 385.

Perpetual injunction only granted when party shows clear right, and the burden of establishing it is upon him, 43 O. S. 526.

Pleading. Very general allegations in the pleadings will warrant the reception of evidence aiding the chancellor in determining whether a judgment should be enjoined, 43 O. S. 571, 572. Laying tracks in street, 2 N. P. 317.

Railroad company may enjoin removal and sale of parts of its mortgaged property, 17 O. S. 642; 10 O. S. 412; 1 D. 229, 552; enjoined from increasing its right of way after location, 39 O. S. 70; from discriminating against shippers, 43 O. S. 571, 572; laying tracks in street, 2 N. P. 317.

School. Allowed against illegal use of school lot, 35 O. S. 143.

Second injunction not allowed unless new matter has arisen, 3 O. 61.

State may maintain, 36 O. S. 434.

Street railroad. Erection of poles can not be enjoined, when, 3 C. C. 425; reversing, 20 Bull 420; double track, 28 Bull 172.

Taxes. Collection of illegal taxes enjoined, §§ 5848-5851. Enjoining taxation, 25 O. S. 143; 27 Id. 218; 3 O. 870. Amount due must be paid, 16 O. S. 615. Not enjoined for error in assessment, 1 C. S. C. R. 566; 3 O. 370. Injunction against putting non-taxable property on duplicate, 35 O. S. 474; see §§ 4998, 5006-6-7, notes.

Telegraph, telephone lines. Erection of poles and lines enjoined, 2 C. C. 259. Removing tickers in breach of contract, 9 Bull 22; 223. Refused when used nine years prior to purchase of property, 7 C. C. 290. Generally, 48 O. S. 390.

Theater. Manager of theater can not be compelled to furnish use of theater under contract for performance, but will be enjoined from furnishing theater for any other play during period of contract, 12 Bull 209.

Trespass on land will not be enjoined, 1 O. S. 591, unless it amounts to waste, 6 O. 166; see 2 C. C. R. 549; 47 O. S. 336; on distinct tracts, 4 C. C. 210. Strikers going on employers' premises, 17 Bull 806.

Waiver, 15 O. S. 64; see Estoppel, supra.

Waste. To prevent waste, 2 O. S. 180; 13 O. 322.

§ 5573. When and by whom injunction granted. The injunction may be granted at the time of commencing the action,¹ or at any time afterward, before judgment, by the supreme court or a judge thereof, the circuit court or a judge thereof, in his circuit, the common pleas court or a judge thereof, in his district, or the probate court, in causes pending therein; and the probate judge of the county may grant injunctions in actions pending in either the court of common pleas or circuit court of the county, in the absence from the county of

¹2 N. P. 8.

the respective judges of such courts, upon its appearing satisfactorily to the court or judge, by affidavit of the plaintiff or his agent, that such plaintiff is entitled thereto. When the injunction has been allowed, and during the pendency of the action in the common pleas court has been vacated, either by a judge thereof in vacation, or by the court previous to the trial of the action, and an appeal is taken, after such trial, from the judgment or final order of the common pleas court to the circuit court, an injunction may be granted at any time before judgment or final order in the action in the circuit court, by the circuit court in which action is pending, or a judge thereof, upon its appearing satisfactorily to such court or judge, by affidavit of such party or his agent, that he is entitled thereto; and upon like proof, an injunction may also be allowed by the supreme court or the circuit court, or by a judge of either, as a temporary remedy, during the pendency of a case on error or appeal in such courts respectively. [85 v. 151; 84 v. 36; 83 v. 61; 82 v. 16; 51 v. 57, § 239; S. & C. 1015.]

The supreme court can not grant injunctions in actions in other courts, 17 O. S. 144; 2 O. S. 498; but under this section the supreme court may allow a temporary injunction on error, 38 O. S. 316, 416; 38 O. S. 32. The provision giving probate judges power to grant injunctions in actions pending in the common pleas and circuit courts, is constitutional, 5 C. C. 545. When the relief sought in the court below was an injunction which was refused, the supreme court may proceed to render the judgment which should have been rendered below, 38 O. S. 32.

§ 5574. Notice of application. If, in the opinion of the court or judge, the defendant, or any party to the suit, should be heard before granting the injunction, a reasonable notice may be required to be given to such party of the time, place, and purpose of the application; and such party may, in the meantime, be restrained. [51 v. 57, § 240; S. & C. 1015.]

§ 5575. When notice required. An injunction shall not be granted against a party who has answered, except upon notice; but such party may be restrained until the decision of the application for an injunction. [51 v. 57, § 241; S. & C. 1016.]

§ 5576. Injunction bond required. No injunction, unless otherwise provided by special statute, shall operate until the party obtaining the same gives an undertaking,

executed by sufficient surety, to be approved by the clerk of the court granting the injunction, in an amount to be fixed by the court or judge allowing the same, to secure to the party enjoined the damages he may sustain if it be finally decided that the injunction ought not to have been granted. [51 v. 57, § 242; S. & C. 1016.]

Execution against the principal is required before action on the bond, 11 O. S. 342, and should be averred, 13 O. S. 135, unless the injunction did not operate to stay execution upon a former judgment, 6 O. S. 336. Approval of the bond by the clerk need not be averred, 1 O. S. 190. The bond is construed strictly in favor of the surety, 1 O. S. 190; 9 O. S. 17; see 4 O. S. 502. It is binding, however, though the court had no jurisdiction of the action enjoined, and the action was never tried on its merits, 7 Bull 343; but if not given, disobedience is not punishable, 37 O. S. 473, unless the action is brought under § 1777 to enjoin the misapplication of the funds of a municipal corporation, when no bond is required to be given, 44 O. S. 277; or where a party, on being informed that an injunction had been allowed to restrain him from doing a particular act, does the act before there is time to give such undertaking; see 37 O. S. 475. Damages must be proved, 4 Rec. 670. A condition to pay the damages defendant may sustain by reason of the injunction, if it is decided it ought not to be granted, includes attorney's fees and expenses in obtaining a dissolution of the injunction, unless the dissolution of the injunction is only incidental to the result, 23 O. S. 264; 25 O. S. 278. A condition to pay all moneys and costs due and to become due from the plaintiff in the bill, and all moneys and costs which may be decreed against him, gives a right of action on the bond for the damages sustained when the bill is dismissed at plaintiff's costs, 4 O. S. 502; but a condition that "plaintiff shall pay to defendants the damages which they or either of them may sustain by reason of the injunction in this action, if it be finally decided that the injunction ought not to have been granted," does not give a right of action on the bond when the court dismissed the original action without prejudice and the costs were paid by plaintiff, 44 O. S. 221. Turnpike company can not recover as damages tolls that it could not lawfully have collected, if the injunction had not been granted, 41 O. S. 144, 145. Injunction without bond void, 37 O. S. 475; 5 C. C. 207. Attorney's fees, 9 Bull 111. Action dismissed by consent, effect as to bond, 35 Bull 164. That no bond is given, not ground for dismissal, 31 Bull 24.

§ 5577. **The order and its service.** The order of injunction shall be addressed to the party enjoined, shall state the injunction, and shall be issued by the clerk; when the injunction is allowed at the commencement of the action, the clerk shall indorse upon the summons "injunction allowed," and it shall not be necessary to issue the order of injunction; nor shall it be necessary to issue the same when notice of the application therefor has been given to the party enjoined; and the service of the summons so indorsed, or the notice of the applica-

tion for an injunction, shall be notice of its allowance. [51 v. 57, § 243; S. & C. 1017.]

§ 5578. **Service of injunction allowed during litigation.** When the injunction is allowed during the litigation, and without notice of the application therefor, the order of injunction shall be issued, and the sheriff shall forthwith serve the same upon each party enjoined, in the manner prescribed for serving a summons, and make return thereof without delay. [51 v. 57, § 244; S. & C. 1017.]

§ 5579. **When injunction operates.** An injunction shall bind the party from the time he has notice thereof, and the undertaking required by the applicant therefor is executed. [51 v. 57, § 245; S. & C. 1017.]

An injunction operates only from the time of notice to the defendant or from its service, 9 O. 198. It operates *in personam* only; it does not work a change of possession or entitle a party to claim it. If two courts have concurrent jurisdiction, the one which first obtains possession of the subject must adjudicate, and neither party can be forced into another jurisdiction, 2 D. 336. An injunction to stay proceedings upon a judgment operates upon the parties to the judgment, and through them upon all officers of the law acting in consequence of that judgment, 10 O. 268, 272; 14 O. 445.

§ 5580. **Second application for injunction.** No injunction shall be granted by a judge after a motion therefor has been overruled by his court on the merits of the application; and when it has been refused by the court in which the action is brought, or a judge thereof, it shall not be granted to the same applicant by a court of inferior jurisdiction, or any judge thereof. [51 v. 57, § 246; S. & C. 1018.]

A bill to obtain a second injunction must show that the new matter alleged did not exist at the time the first bill was filed, or that if it existed, it was unknown to the complainant, 3 O. 61.

§ 5581. **How enforced and disobedience punished.** An injunction or restraining order granted by a judge may be enforced as the act of the court, and disobedience thereof may be punished by the court, or any judge who might have granted it in vacation, as a contempt; an attachment may be issued by the court or judge, upon being satisfied, by affidavit, of the breach of the injunction or restraining order, against the party guilty of the same; and such party may be required by the court or judge to pay a fine not exceeding two hundred dollars, for the use

of the county, to make immediate restitution to the party injured, and to give further security to obey the injunction or restraining order, and, in default thereof, he may be committed to close custody until he complies with such requirement, or is otherwise legally discharged. [72 v. 50, § 247.]

See § 5576, note.

§ 5582. Party enjoined may apply for further security.

A party enjoined may, at any time before judgment, upon reasonable notice to the party who obtained the injunction, move the court for additional security; and if it appear that the surety in the undertaking has removed from the state, or is insufficient, the court may vacate the injunction, unless, in a reasonable time, sufficient security be given. [51 v. 57, § 248; S. & C. 1018.]

And the court, in continuing an injunction, may require additional security or a new bond to be given as a substitute for the first. If the order is not complied with, as where by mistake of the clerk the new bond is conditioned merely for the payment of the costs, the former bond is not discharged, 6 O. 336; s. c. 7 O. (Pt. 2) 209.

§ 5583. Affidavits on hearing of application. On the hearing of an application for an injunction each party may read affidavits; and all affidavits shall be filed. [51 v. 57, § 249; S. & C. 1018.]

Affidavits must be positive, 6 Rec. 415.

§ 5584. Motion to vacate or modify injunction. When an injunction has been granted, a party may, at any time before the trial, apply to the court in which the action is pending, or a judge thereof, to vacate or modify the same; the party applying for such vacation or modification shall give to the adverse party such notice of the time and place at which the motion will be heard as the court or judge may deem reasonable; and the application may be made upon the petition and affidavits upon which the injunction was granted, or upon affidavits on the part of the party enjoined, with or without answer. [82 v. 35; 54 v. 139, § 250; S. & C. 1018.]

Under the former practice, where there was an appeal from an interlocutory order dissolving an injunction, affidavits were competent testimony in the district court on a motion to dissolve, 31 O. S. 561; 17 O. S. 144. An appeal does not lie from an interlocutory order modifying an injunction, 1 C. C. 417. An order of the common pleas court overruling a motion to dissolve an injunction may be reviewed on error by the circuit court, 45 O. S. 631; 3 C. C. 455; but an order of a judge

of the common pleas court in a special proceeding, made at chambers, is not reviewable, 48 O. S. 308.

§ 5585. Affidavits on motion. When the application is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other evidence, in addition to the evidence on which the injunction was granted. [51 v. 57, § 251; S. & C. 1018.]

§ 5586. Defendant may obtain an injunction. A defendant may obtain an injunction upon an answer in the nature of a counter-claim, and he shall proceed in the manner prescribed in this chapter. [51 v. 57, § 252; S. & C. 1018.]

See 35 O. S. 567.

CHAPTER V.

RECEIVERSHIP, AND OTHER PROVISIONAL REMEDIES.

§ 5587. When receiver appointed. A receiver may be appointed by the supreme court or a judge thereof, the circuit court or a judge thereof in his circuit, the common pleas court or a judge thereof in his district, or the probate court, in causes pending in such courts respectively, in the following cases:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured.

2. In an action by a mortgagee, for the foreclosure of his mortgage, and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt.

3. After judgment, to carry the judgment into effect.

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned un-

satisfied, and the judgment debtor refuses to apply the property in satisfaction of the judgment.

5. In the cases provided in this title, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

6. In all other cases where receivers have heretofore been appointed by the usages of equity. [82 v. 35; 51 v. 57, § 253; S. & C. 1018.]

Appointment, powers, etc. A receiver is a ministerial officer, 12 O. S. 419. His possession is the possession of the court, 2 D. 336; and a levy upon property in his hands is a contempt of court, 10 O. S. 372; 12 O. S. 419. He may be removed by the court which appointed him, 31 O. S. 1; and the authority of the judge to appoint or discharge him is not required to be exercised in the county in which the action is pending, Id. Proceedings in relation to the appointment and removal of receivers are special proceedings, and an order affecting a substantial right in such proceedings is a final order, Id. Appeal does not lie from his appointment, 10 O. S. 622, and an appeal does not vacate the office, 24 O. S. 1. A foreign receiver may be permitted to take possession of property in this state, 38 O. S. 174, 184, and a receiver may be appointed in this state to take possession of property in a foreign country when all the owners are within the jurisdiction of the court and it is otherwise a proper case for the appointment of a receiver, 11 Bull. 319. The appointment of a receiver to take from the defendant the possession of his property can not be lawfully made without notice, unless the delay required to give such notice will result in irreparable loss, 37 O. S. 649. When proceeding in error does not affect order of court below or power of court below to make an order for preservation of property by a receiver or otherwise, 12 O. S. 341; 24 O. S. 1. Power to appoint and practice in appointing receivers by court and judge at chambers, see 31 O. S. 1. When books of account belonging to one person are attached by the sheriff, as the property of another, and the court appoints a receiver who collects the accounts, the sheriff is liable to the owner for the amount collected, 20 O. S. 57.

Railroad receiver liable for negligence of himself and agents, how sued, 20 O. S. 137; see 20 O. S. 152. The appointment of a receiver is merely a provisional remedy ancillary and auxiliary to the main action and can only be made in an action brought to obtain some other equitable relief which the court has the right to grant and where it appears to be necessary to make such appointment in order to preserve the property during the litigation, so that the relief awarded by the final judgment, if any, may be effective, 2 C. C. 518. A court of equity may at the suit of a stockholder, enjoin unlawful conduct on the part of the directors of a corporation, and if it be made clearly to appear to the court that the appointment of a receiver is really necessary to effect the purpose of the suit, such receiver may be appointed; but in the absence of such necessity and where full relief may be afforded by injunction, the appointment of a receiver is an abuse of discretion,

Id. This section does not apply to a proceeding under § 5651, to dissolve a corporation. The court has no authority to appoint a receiver until after an order has been made dissolving the corporation, 5 C. C. 289. That a board of directors commit acts that are *ultra vires*, but without bad faith, is no ground for the appointment of a receiver, 2 C. C. 533.

1. In an action by a creditor to subject any property or fund to his claim, see 11 O. S. 323. And a receiver will be appointed to take possession of mining property, although the persons interested in it are not partners, where there is a number of joint proprietors who can not agree as to the working of the mines or the disposition of the property, 11 Bull 319. And where an insolvent corporation was making no effort to pay its debts, and its business could not be continued without loss and wasting of its assets, the sale of its property and collection of its accounts being necessary for the payment of its debts, on application of a surety of the corporation to compel payment of its indebtedness, under § 5845, the appointment of a receiver was held authorized under this section, 45 O. S. 133. But where no fraud or insolvency was charged, and it did not appear that the property was in danger of removal beyond the jurisdiction of the court, the controversy being solely as to the effect of an attempted consolidation of railroads, the appointment of a receiver was refused, 37 O. S. 649, 659.

2. In such action, mortgagees held entitled to funds in the hands of the receiver in the order of their priorities, 41 O. S. 682.

4. Receiver appointed to secure income to satisfy alimony, W. 492.

5. Action by creditors to compel receiver to set aside fraudulent conveyance of dissolved corporation made before dissolution, 40 O. S. 575; see 2 C. C. R. 518. In an action to enforce the statutory liability of stockholders a receiver may be appointed to collect and distribute the fund, and he may prosecute actions in his own name as such receiver to enforce payment of judgments rendered under such statutory liability, 50 O. S. 208.

6. See 45 O. S. 133; 1 N. P. 22; 2 Id. 259.

§ 5588. Who ineligible as receiver. No party, attorney, or person, interested in an action, shall be appointed receiver therein except by consent of the parties. [51 v. 57, § 254; S. & C. 1019.]

Mortgagee ineligible, 4 Bull 294; 8 Rec. 23.

§ 5589. Oath and undertaking by receiver. The receiver, before he enters upon his duties, must be sworn to perform them faithfully, and, with surety approved by the court, judge, or clerk, execute an undertaking to such person, and in such sum, as the court or judge shall direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein. [51 v. 57, § 255; S. & C. 1019.]

§ 5590. Powers of receiver. The receiver shall have power, under the control of the court, to bring and defend actions in his own name, as receiver, to take and keep possession of the property, to receive rents, collect, compound for, and compromise demands, make transfers, and generally to do such acts respecting the property as the court may authorize. [51 v. 57, § 256; S. & C. 1019.]

A receiver of an insolvent corporation may maintain an action to recover interest paid by it to a national bank under R. S. U. S. § 5198, 17 Bull 366. A railroad receiver is a proper party plaintiff in a suit to restrain ditch proceedings against the company commenced after his appointment, 2 C. C. R. 10. A foreign receiver has been permitted to sue in his own name to recover property in this state, 38 O. S. 174. Leave of court must be first had before an action can be maintained against a receiver, 2 D. 336; but it is sufficient if notice of the application for leave to sue is given to the receiver only, 20 O. S. 150; railroad receivers, however, may sue and be sued without leave of court, § 3416, in any county through or into which the road is constructed, § 3416. But a failure to obtain leave to sue does not affect jurisdiction of court in which suit is brought, 51 O. S. 519. A railroad receiver is liable for injuries resulting from negligence in the operation of the road, 20 O. S. 137, 150, while the railroad company under his control is not liable, 2 Bull 249; but judgments against him can only be satisfied from funds in his hands, 20 O. S. 137. A mandamus will not be allowed against the corporation and receiver, directing their conduct in operating the road, 35 O. S. 154. A petition in an action on a promissory note, brought by a receiver, which alleged that the plaintiff was duly appointed such receiver by a court having power to appoint, and that there was due the plaintiff, as such receiver, etc., is sufficient on demurrer, 29 O. S. 499. A party injured by the negligent operation of a railroad company in the hands of a receiver, may, by leave of court, bring an action against him "as receiver," and it is no defense in such action that the receiver was a public officer, or that he was an agent or trustee, 20 O. S. 137. Set-off may be pleaded in action brought by receiver of national bank, 31 O. S. 231. Attorney's fees payable out of the fund, 35 O. S. 581. Receiver of insolvent corporation to distribute proceeds of sale of its property according to the laws relating to estates of insolvent debtors, 14 Bull 109. Levy on property in hands of, 3 C. C. R. 489.

§ 5591. Investment of funds by receiver. Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order shall be made except upon the consent of all the parties to the action. [51 v. 57, § 257; S. & C. 1019.]

§ 5592. Disposition of property in hands of trustee. When it is admitted by the pleading, or on the examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court. [51 v. 57, § 258; S. & C. 1019.]

§ 5593. How certain orders of court may be enforced. When a court, in the exercise of its authority, orders the deposit or delivery of money or other thing, and the order is disobeyed, the court, besides punishing the disobedience as for a contempt, may make an order requiring the sheriff to take the money or thing, and deposit or deliver it in conformity with the direction of the court. [51 v. 57, § 259; S. & C. 1019.]

DIVISION VII. SPECIAL PROCEEDINGS.

CHAPTER I.

AMERCEMENT.

§ 5594. Causes for which sheriff or other officer may be amerced. If an execution or order of sale directed to an officer come to his hands to be executed, and he neglect or refuse to execute it; or if he neglect or refuse to sell property of any kind which, by any writ or order, he is directed to sell; or fail to call an inquest, or to return to the clerk's office a copy of the certificate of appraisement made by the inquest; or neglect to return to the proper court an execution or order of sale to him directed on or before the return day thereof; or neglect to return a correct inventory of personal property taken on execution, unless he return that the amount of the

judgment, including costs, has been paid to him; or neglect, on demand, to pay to the person entitled thereto, any money by him collected or received for the use of such person, at any time after he collects or receives the same; or neglect or refuse, on demand, to pay to the judgment debtor all money by him received on any sale made, beyond what is sufficient to satisfy the writ or order of sale, with interest and costs, such officer shall, on motion in court, and notice thereof, in writing, as provided in the next section, be amerced in the amount of such judgment, including costs, with ten per cent. thereon, to and for the use of such plaintiff or defendant, as the case may be. [51 v. 57, § 451; S. & C. 1084.]

The sheriff is amercible only in cases which come within the spirit as well as the letter of the statute, 10 O. 45; 3 O. S. 522; 10 O. S. 28, 77; 16 O. S. 50. He is not amercible for proceeds of goods sold under agreement of parties in a non-judicial way, 3 O. S. 522; nor for price of goods sold on credit by agreement of parties, 10 O. S. 77; nor if execution is for more than the proper amount, 16 O. S. 50; nor for refusal to pay over money before confirmation of sale, 2 O. 503; nor where there is no law authorizing the writ, 2 H. 173; nor for a fine collected, see 1 W. L. J. 500, for not returning copies, see Id. 104. Return by sheriff that bond was taken for redelivery of goods, and that goods were not delivered, is no excuse, 6 O. 450; nor is attachment of money received by sheriff on execution, 1 O. 275. Demand of moneys due should be made, but action may be brought before actual demand, and interest will be allowed from the commencement of the action, 2 D. 490. Amercement was not within statute of limitations, 1 W. L. J. 305; it is a penal proceeding to be strictly pursued, W. 720. On payment of amercement, sheriff is subrogated to the rights of plaintiff, 33 O. S. 85. *Quere*: Whether sheriff can be amerced before return, 3 O. S. 522. Amercement of attorneys, when suit dismissed, for non-attendance; for refusal to pay over moneys collected, § 564; of justices of the peace, § 6700, in probate court, §§ 541, 542. Sheriff liable for neglect to return order of sale to the proper court though the making of such return be not demanded by plaintiff, 7 C. C. 55. Liable to amercement for failure to execute order to sell mortgaged premises for cash if he accepts the bid of the mortgagor and closes the sale to him without payment of the price, Id.

§ 5595. **Notice of motion for amercement.** If the officer resides in the county in which the motion is made, the notice shall be served upon him at least two days before the motion is heard; but if he is an officer of another county, the notice shall be served upon him, or left at his office, at least fifteen days before the first day of the term at which the motion will be heard, or sent to him by mail at least sixty days before the first day of such term. [51 v. 57, § 451; 64 v. 64, § 455; S. & C. 1084; S. & S. 565.]

No pleading required, 6 O. 449, but facts must be stated in motion, 12 O. 210. Slightest variance between notice of motion and motion itself fatal, 3 O. S. 522. When return of sheriff shows on its face a due execution of the writ, the plaintiff on motion to amerce can not go behind it, but is left to his remedy by action for false return, 12 O. 220; but date of return indorsed is not conclusive, 10 O. S. 28. Motion must be made in open court; filing it in the clerk's office is not sufficient, 3 O. S. 522.

§ 5596. Amercement for not serving or returning process. If an officer fail to execute any summons, order, execution, or other process (1), directed to him, or to return the same, as required by law, unless he make it appear, to the satisfaction of the court, that he was prevented by unavoidable accident from so doing, he shall be amerced, upon motion and notice, as provided in § 5594, in a sum not exceeding one thousand dollars, and be liable to the action of any person aggrieved by such failure; but he shall not be liable to an action or amercement for a failure to execute any such process directed to him from any county other than that in which he was elected, unless his fees are deposited with the clerk who issued the process, and an indorsement of that fact is made and subscribed by such clerk on the process, at the time of its issue, in these words: "Funds are deposited to pay the sheriff on this process." (2) [65 v. 96, § 592; S. & S. 572.]

1. Judgment against sheriff amerced for neglect to execute final process should include the amount of the original judgment, interest thereon, costs, and ten per centum upon the whole sum thus made up; and the judgment amercement draws interest as other judgments until paid, 12 O. 210. 2. And a tender of his fees can not be substituted in place of such indorsement, 10 O. 45.

§ 5597. Clerks may be amerced for not paying over money. If a clerk of a court neglect or refuse, on demand, to pay to the person entitled thereto any money by him received in his official capacity for the use of such person, he may be amerced, on motion and notice, as provided in § 5594. [51 v. 57, § 452; S. & C. 1085.]

§ 5598. Amount of amercement for not paying over money. When the cause of amercement is the refusal to pay over money collected, the officer shall not be amerced in a greater sum than the amount withheld, with ten per cent. thereon. [51 v. 57, § 453; S. & C. 1085.]

§ 5599. Surety of officer may be made party to judgment. A surety of an officer may be made party to the judgment rendered as aforesaid against such officer, by

action, but the goods and chattels, lands and tenements, of such surety, shall not be liable to execution when sufficient goods and chattels, lands and tenements, of the officer against whom execution is issued, can be found to satisfy the execution; and either party may proceed against the officer by attachment. [51 v. 57, § 456; S. & C. 1086.]

Action on judgment of amercement may be brought against sureties on official bond in the county where the amercement was had, although none of the defendants resided in such county, 14 Neb. 532; see § 5025.

§ 5600. Officer may have execution on original judgment. If an officer who is amerced has not collected the amount of the original judgment, he shall be permitted to sue out an execution, and collect, for his own use, the amount of the judgment, in the name of the original plaintiff. [51 v. 57, § 457; S. & C. 1086.]

Where the sheriff in such case is amerced and sues out execution the process should be directed to the coroner, 83 O. S. 85.

CHAPTER II.

ARBITRATION.

§ 5601. Arbitration of controversies. Submission may be made a rule of court. All persons who have any controversy, except when the possession or title of real estate may come in question, may submit such controversy to the arbitrament or umpirage of any person or persons, to be mutually agreed upon by the parties, and they may make such submission a rule of any court of record in the state. [29 v. 264, § 1; S. & C. 80.]

Administrators and executors may submit disputed claims to arbitration at common law, 9 O. S. 333, and under the statute, § 6093; 9 Bull 244; 11 Bull 117, pending suit, 9 Bull 244; 11 Bull 117 (and the fact that an executor has rejected a claim on which suit has been brought does not estop him from submitting it to arbitration, 11 Bull 117); see 5 Rec. 367; but not a claim as to real estate, 1 Clev. R. 98. Contractors or sub-contractors under mechanic's lien law, § 3200, county commissioners at common law, but not so as to divert fund, 2 D. 189. Employer and employe may submit disputes to arbitration, 82 v. 45. Municipal corporations, disputed claims, for "persons" in the statute include municipal corporations, 42 O. S. 543. A partner, W. 420. Stockholders of railroads in case of sale, lease, or aid by subscription, § 3302, or consolidation, § 3388. At common law the submission may be revoked before award rendered, 1 D. 870; 4 O. 310; but not after the arbitrators are sworn under the statute,

19 O. 245; 1 O. S. 463; see 1 D. 370. Submission anew vacates award, W. 174. Agreement to submit can not be enforced, 1 O. S. 166, as provided in revaluation clause of lease, 22 O. S. 463. The arbitrators are constituted, by the parties, chancellors, judges, and jurors, and have jurisdiction of the law and fact, and they may, after hearing the parties and their proofs, meet for consultation and decision without giving either party notice of such meeting, 7 O. (Pt. 1) 99. The statute does not provide for taking exceptions before a board of arbitration, and if such exceptions are taken the case is not reviewable thereon, 42 O. S. 543.

The liability on an award originates in the contract of submission and in an action thereon both the submission and award must be averred, 3 O. 510. An agreement to submit a question of boundary to arbitration defeats the operation of the statute of limitations, 4 O. 310. Where the written submission is of all differences, damages and claims whatsoever existing between the parties and the award purports to have been made "as per submission in writing," the presumption is authorized that all claims and matters of difference presented by the parties were considered, 45 O. S. 377; aff. 11 Bull. 200. Where the parties to such submission stipulate as one of its terms that the arbitrator in calculating whatever may be due on a matured promissory note calling for interest at ten per cent., shall compute interest thereon at that rate, such submission is not a usurious contract and an award rendered in pursuance of it is valid, Id.

§ 5602. Parties to arbitration may enter into bonds. The parties to such submission may enter into and exchange arbitration bonds, which shall be conditioned for the faithful performance of the award, and set forth the names of the arbitrators (1) or umpire, and the matters submitted to their determination; and when such is the agreement, the submission shall be made a rule of any court of record within the state, or a rule of any particular court of record named in the submission. [29 v. 264, § 2; S. & C. 81.]

1. 1 D. 370; 2 C. S. C. R. 3.

§ 5603. Time and place of hearing to be specified in bonds. The arbitration bonds shall specify a time and place for the hearing, allowing the arbitrators or umpire the right to adjourn from time to time, until a conclusion is reached; and a time shall be named in the bonds within which the award shall be made. [29 v. 264, § 3; S. & C. 81.]

§ 5604. How process obtained. The parties shall have the benefit of legal process to compel the attendance of witnesses, which process shall be issued by the clerk of the court of common pleas or any justice of the peace for the county in which the arbitration is held, and shall be returnable before the umpire or arbitrators on a day and place certain therein named. [29 v. 264, § 4; S. & C. 81.]

§ 5605. Disobedience of process, etc., a contempt of court. When a witness who has been duly served with such process fails to attend in obedience thereto, or to be sworn or to answer as a witness, except in case of a demand and failure to pay his fees, he shall be deemed guilty of contempt of the court from which the process issued; and on complaint made by the party injured, to the court of common pleas whose clerk issued the process, or to the justice, as the case may be, such court or justice may proceed against him as in other like cases. [29 v. 264, § 5; S. & C. 81.]

§ 5606. Arbitrators, witnesses, etc., to be sworn. The umpire or arbitrators, and all witnesses for any party to the arbitration examined by the umpire or arbitrators, shall be under oath, to be administered to him or them respectively by any judge or justice of the peace of the county. [29 v. 264, § 6; S. & C. 81.]

The oath can not be administered by a notary public, 36 O. S. 281; but where the defendant, an attorney at law, was present when the oath was administered by a notary public, and made no objection to the proceeding, he was held to have waived the objection, 9 Bull 244; 11 Bull 117. Waiver of oath, 45 O. S. 377; 18 Bull 373. Not required at common law, 11 Bull 200. Perjury can not be assigned when the oath is administered by a notary public, 36 O. S. 281. It is not necessary that an arbitrator himself administer the oath to the witnesses before him and when he is a justice of the peace, he is authorized to administer a valid oath to the witnesses, although he is himself unsworn as arbitrator, 45 O. S. 377.

§ 5607. Award to be in writing, etc. The award shall be in writing, and signed by the umpire or arbitrators, or a majority of the arbitrators, named in the submission; and a true copy of the award shall, without delay, be delivered by the umpire or arbitrators to each of the parties in interest. [29 v. 264, § 7; S. & C. 81.]

Majority only need sign the award, 5 Bull 415. At common law, a majority can not make an award, 16 O. S. 573. The statutory award must state the time and place of meeting, 3 O. 286, but not at common law, nor is it necessary at common law that the award should state that the parties were notified, witnesses examined, and evidence offered, or that the award was published from the office of the arbitrator, 11 Bull 200. An award to deliver books, papers, and accounts, a small chest and wearing apparel is too indefinite to be enforced, 3 O. 266. What interest sufficiently definite to be determined by arbitrators, 5 Bull 415. The decision of a court can not be treated as an award, 19 O. S. 392, unless it had no jurisdiction, 6 O. 490. The award may be under the direction of the court, though it is not bound by it, 1 O. S. 166; see 45 O. S. 377; 18 Bull 373.

§ 5608. Award to be filed in court when parties neglect, etc., to comply with same. If either of the parties neglect or refuse to comply with the award, the other party may file the award, together with the submission or arbitration bond, in the court named in the submission, or, if no particular court is named therein, then in the court of common pleas of the county where the arbitration was held. [29 v. 264, § 8; S. & C. 82.]

§ 5609. How award for payment of money enforced. The court, at the next term thereof after the award is filed, if no legal exceptions be made or taken to the award, or to other proceedings, and the award is for the payment of money, shall enter judgment thereon, as on the verdict of a jury, between the parties, and issue execution thereon as in other cases immediately after the amount specified in the award is due and payable. [29 v. 264, § 9; S. & C. 82.]

No action is required to be brought on the award under this nor under § 6093, providing for the arbitration of doubtful claims, by executors and administrators, but the court may enter judgment on the award when made, 11 Bull 117. Under the statute, however, there must be a rule and notice before judgment can be entered, W. 86. An award under the common law operates neither as a judgment nor verdict, and the failure to perform it may constitute a cause of action, or its performance may furnish a good defense in a subsequent suit between the parties on the same subject matter, but no judicial action can be had upon it without pleadings as in other cases, 9 O. S. 333; 10 O. S. 512. In an action on an award at common law, the petition must aver both the submission and award, 3 O. 510. Objections to an award must be filed at first term, 1 O. S. 463. Judgment entered upon an award at the same term at which it is filed is valid, 10 O. S. 365.

§ 5610. How award other than for payment of money enforced. When the award directs the performance of any act or thing other than the payment of money, a party who disobeys it shall be liable to be punished as for a contempt of court, either by attachment or execution, as the nature of the case requires. [29 v. 264, § 10; S. & C. 82.]

§ 5611. Power of court to set aside award. If legal defects appear in the award or other proceedings, or if it be made to appear, on oath, at the term of the court at which the award and arbitration bond are filed, that the award was obtained by fraud, corruption, or other undue means, or that the arbitrators or umpire misbehaved, the court may set aside the award, and the mat-

ters submitted shall be retained by the court for trial as upon appeal; the court shall direct who shall be plaintiff and who shall be defendant in the action, and such proceedings shall thereafter be had therein, and such pleadings filed, as in a civil action; and the court may make such order as to costs in the premises, or such other order on the award, as it deems just and right. [74 v. 78, § 11.]

An award may be set aside by agreement, W. 174; for interest or misconduct of arbitrators, 1 D. 370; for error of law appearing on its face, 1 H. 334; for any good equitable grounds, 20 O. S. 231; for uncertainty, 3 O. 266 (1827); but not for mistake in signing submission, 1 O. S. 166; nor because of relationship of arbitrator to party, when the opposite party, knowing of the fact, made no objection until after the award was made, 38 O. S. 423. Power of court to order remittitur, 11 Bull 117. Nor for misconduct of arbitrator talking to party and witnesses not shown to have influenced his decision or prejudiced the other party who knowing the facts did not object at the time, 11 Bull 117. After a party has interposed his objections and the litigation thereon has been carried to the court of last resort and decided, it is too late to offer new causes why judgment should not be entered on the award, 1 O. S. 463. Award of arbitrators is final and can not be impeached for error. Nothing but fraud in the parties or in the arbitrators can be alleged to avoid it, 7 O. (Pt. 1.) 99.

§ 5612. What proof required before court will enforce award. In all cases the party enforcing an award shall produce satisfactory proof to the court of the due execution of the submission or arbitration bond, and that the party neglecting or refusing to obey the award was furnished with a true copy thereof at least ten days before the term at which the application to enforce the award was made. [29 v. 264, § 12; S. & C. 83.]

Proof may be waived, 1 O. S. 463.

§ 5613. Fees of arbitrators, etc., to be taxed in the award. Each person chosen as and performing the duties of an arbitrator or umpire under this chapter shall be entitled to receive one dollar per day for his services; and each witness for his attendance, and justice or judge for administering oaths, shall be entitled to like fees as in other cases, which fees shall be taxed by the umpire or arbitrators, and included in the award. [29 v. 264, § 13; S. & C. 83.]

CHAPTER III.

BASTARDY.

§ 5614. **Complaint and warrant for arrest.** When an unmarried woman, who has been delivered of or is pregnant with a bastard child, makes complaint thereof in writing, under oath, before any justice of the peace, charging a person with being the father of such child, the justice shall thereupon issue his warrant, directed to any sheriff or constable of this state, commanding him to pursue and arrest such accused person in any county in the state, and bring him forthwith before the justice to answer the complaint: [70 v. 111, § 1.]

The action may be brought though the complainant is not a resident of, 5 Bull 889; 41 O. S. 280, and though the child is not born in, Ohio, 41 O. S. 280. It can not be maintained if the child was begotten and born during lawful wedlock, 30 O. S. 627; nor if, after the child is begotten and during pregnancy, the mother contracts marriage with another man, who marries her with knowledge of her condition, 43 O. S. 473. Marriage of the complainant, however, is no defense if the marriage was void, 12 Bull 234; and marriage after the prosecution is begun does not terminate it, 21 O. S. 646; and where the child was begotten during marriage, but born after a divorce, and it was shown that complainant had been deserted by her husband several years previous and could not have had access to him, a verdict and judgment that the child was a bastard and defendant its father, it was held, would not be disturbed, 9 Bull 287. The complaint must show that complainant is unmarried, W. 564; see 8 O. 376; 23 Bull 149. A married woman can not maintain proceedings having reference to a child born before her marriage, 29 Bull 190. Plaintiff delivered of a dead fœtus or embryo child twelve weeks after conception can not recover, 7 C. C. 263. A mayor has jurisdiction in bastardy concurrent with justices, § 1744, 86 O. S. 624. A bastardy prosecution is only *quasi* criminal, and if in the name of the state should be on the complaint of, etc., but it would be more proper to carry on the suit in the name of the party complaining, W. 564. The prosecuting attorney is not bound to attend to such suits, Id.

§ 5615. **Examination of the complainant.** Upon the return of the warrant the justice shall examine the complainant, under oath, in the presence of the accused, respecting the cause of her complaint; the accused shall be allowed to ask the complainant, when under oath, any question he may think necessary for his defense; and the examination of the complainant by the justice, the questions of the defendant, and the answers thereto

by the complainant, shall be reduced to writing, in the presence of the justice, and subscribed by the complainant. [74 v. 11, § 2.]

On such examination, the justice is authorized to administer an oath only to the complainant, and no other witnesses can be examined, 26 O. S. 81.

§ 5616. Adjournment of examination, and bond to answer complaint. The justice may, on the request of either party, and upon good cause shown, continue the examination for a period not to exceed ten days, upon the accused entering into a recognizance to the state of Ohio, with sufficient surety, in a sum not less than three hundred nor more than six hundred dollars, to appear and answer the complaint, at the time fixed for the hearing thereof, and abide the order of the justice. [74 v. 11, § 2.]

§ 5617. Compromise and bond. If, during the examination before the justice, or at any time before judgment in the court of common pleas, the accused pay, or secure to be paid, to the complainant, such amount of money or property as she may agree to receive in full satisfaction, and give bond to the state of Ohio, with sufficient surety, to be approved by the justice, court, or judge in vacation, conditioned to save any county, township, or municipal corporation within the state free from all charges for the maintenance of such bastard child, the justice, court, or judge in vacation, shall discharge the accused from custody, upon payment of the costs of prosecution; but such agreement shall be made or acknowledged by both parties, in the presence of the justice, court, or judge, who shall thereupon enter a memorandum thereof upon his docket, or cause the same to be made upon the journal. [74. v. 11, § 2.]

A plea of former prosecution and compromise is defeated by showing fraud, 31 O. S. 522. A compromise without payment or security to township is no defense, 1 W. L. J. 396; 2 W. L. M. 308. It is no defense to an action on a note given on settlement to show that the child died, or that the settlement was not made according to the statute, 8 O. S. 265. An answer to be a bar to such proceeding must show: 1. The payment, or securing to be paid, to the complainant the amount of money or property agreed to be received in full satisfaction. 2. The giving "bond to the state of Ohio with sufficient surety," to be approved and conditioned as required by said section. 3. The discharge of the accused from custody, upon payment of the costs of prosecution. 4. That the agreement was made or acknowledged by both par-

ties in the presence of the justice, and a memorandum thereof entered upon his docket. Where such answer shows the first and fourth requirements, but fails to show the other two, the defense is not made out, 2 C. C. R. 188. Sufficiency of entry of compromise by justice, 31 O. S. 522. Under the act of 1824 the complainant could only settle while the complaint was pending before the justice, but not after accused was recognized, 4 O. S. 668.

The great leading object of the law is to protect the public; the complainant can not by such settlement impair the public security; settlement can not be made until the accused has given security that the public shall not be burdened with the support of the child, 2 C. C. R. 188. The statute must be strictly followed in giving bond; the state of Ohio must be the obligee, *Id.* Entry by justice on his docket that the parties compromised without complying with the statute in detail, the compromise will be no bar to a subsequent proceeding for bastardy before another justice, 31 O. S. 522, 527. Compromise may be impeached for fraud, *Id.* *Ecs adjudicata*, 9 C. C. 239.

§ 5618. When no compromise made, accused to be recognized. When a compromise is not made, the justice before whom the complaint was made shall bind the accused to appear at the next term of the court of common pleas, in a recognizance to the state of Ohio, with sufficient surety, in a sum not less than three hundred nor more than six hundred dollars, to answer the accusation, and abide the order of the court; and on neglect or refusal to find such security, the justice shall cause the accused to be committed to the jail of the county, there to be held to answer the complaint. [70 v. 112, § 4.]

Sureties discharged by appearance of accused, 24 O. S. 177, if before forfeiture, 38 O. S. 606. The recognizance is not invalidated by the omission of the word "next" (term), *Id.*; nor for error in naming the township for the benefit of which, under 70 v. 112, the recognizance was required to be executed, 29 O. S. 452. The action on a recognizance under this section is in the name of the state, *Id.*, but the mother is the party in interest, 10 Rec. 307.

§ 5619. Proceedings for discharge, on bail, of person committed in default thereof. A person committed to jail for failure to give such recognizance may be discharged from custody by entering into recognizance, with sufficient surety, in a sum not less than one hundred nor more than six hundred dollars, to be taken and approved by a judge of the court of common pleas, or the probate judge of the county, and by him filed in the office of the clerk of the court of common pleas. [70 v. 112, § 5.]

§ 5620. Justice shall file transcript and papers with clerk. The justice before whom the examination is had shall, within thirty days thereafter, file with the clerk of

the court of common pleas of the county a certified transcript of the proceedings, together with the recognizance, if any be taken, and all other papers therein. [70 v. 112, § 6.]

The neglect of a justice to file the transcript and other papers within thirty days does not defeat the prosecution. When the transcript filed in the common pleas has been lost, a new one may be substituted; and if the written examination of the complainant has been lost, its contents may be proved by parol, and for that purpose the complainant is a competent witness; and if at the trial term such papers are lost, a motion by the defendant to continue the cause until the papers are found is addressed to the discretion of the court, and the overruling of the motion is not error, 26 O. S. 7.

§ 5621. Continuance of cause in common pleas. Effect on bond. If, at the next term of the court, the complainant has not been delivered, or is unable to attend, or if there be any other sufficient reason therefor, the court may order a continuance of the cause; and such continuance shall operate as a renewal of the recognizance, which shall remain in full force until final judgment. [70 v. 112, § 7.]

Where the transcript and recognizance were filed at the term of the court to which the defendant was recognized, but there was no order continuing the cause either at that term or the next term thereafter, and at the next, being the third term, the recognizance was forfeited, the cause tried, and a verdict of guilty rendered and judgment pronounced against the defendant in his absence, it was held that, there being no continuance of the cause at the first term, the recognizance did not bind the defendant to appear at any subsequent term, and the trial in his absence was unauthorized, 31 O. S. 147. The case may be continued as other cases, 23 O. S. 320 (S. & C. 117). A general entry will continue the case, 10 Rec. 307. The presence in court of plaintiff in bastardy is not absolutely necessary at the trial, but it is within the discretion of the court to proceed, 6 Bull 124.

§ 5622. Surrender of accused by sureties, and new recognizance. If the sureties on the recognizance, at any term of the court of common pleas, surrender the accused, and request to be released from the recognizance, or if the court deems the recognizance insufficient, the court may order a new recognizance to be taken, cancel the first recognizance, and commit the accused until a new recognizance is given. [70 v. 112, § 7.]

An answer of a surety that he took the accused and, at a subsequent term of the court, surrendered him in open court, and requested a release from the recognizance, without stating whether such surrender was before the recognizance was forfeited or before final judgment in the bastardy suit, or that the recognizance was canceled, is insufficient, 38 O. S. 606.

§ 5623. Failure of accused to appear at court, and forfeiture of recognizance. If the accused fail to appear at the term of the court to which he is recognized, his recognizance shall be forfeited; and if a verdict of guilty be rendered, and judgment entered thereon as hereinafter provided, the amount of such forfeited recognizance shall be applied in payment of the judgment. [70 v. 112, § 8.]

30 Bull 52; 50 O. S.

§ 5624. Accused permitted to defend. Before or upon the hearing of the complaint, the court, in every case, shall permit the accused to appear in person, or by counsel, and make defense. [70 v. 115, § 20.]

§ 5625. The trial in court. When the accused pleads not guilty of the charge, before the court to which he is recognized to appear, or, having been recognized, fails to appear, the court shall order the issue to be tried by a jury; and at the trial of such issue, the examination before the justice shall be given in evidence by the complainant. [70 v. 113, § 9.]

A trial can not be had without the presence and testimony of complainant, 16 O. 56, 57. Defendant is a competent witness, 9 O. S. 402; see 6 Bull 124, 125; 20 Id. 318; § 5621a. Exhibiting child to jury as evidence of alleged paternity, etc., not error, 28 Bull 353; 49 O. S.

§ 5626. Order of court when accused adjudged reputed father. If the accused, in person or by counsel, confess in court that the accusation is true, or if, upon the trial, the jury find him guilty, he shall be adjudged the reputed father of the bastard child, and shall stand charged with the maintenance thereof in such sum as the court shall order and direct, with payment of costs of prosecution; the court shall require the reputed father to give security to perform such order; and in case he neglect or refuse to give such security, and pay the costs of prosecution, he shall be committed to the jail of the county, there to remain, except as provided in the next section, until he complies with the order of the court. [70 v. 115, § 21; 72 v. 49, § 10.]

The section is not unconstitutional because it provides for imprisonment, the sum in which the defendant is charged not being a debt within the meaning of § 15, article I., of the constitution, 21 O. S. 353. An order of maintenance is a judgment of a court of competent jurisdiction, and can not be impeached collaterally; and such judgment may be enforced by execution as in other cases, the security given being only to be resorted to in

case of the inability of the defendant, 9 O. 149. The provisions of § 5519 have no application to a proceeding under this chapter, 15 O. S. 43. The court may apportion costs if the jury return a verdict of not guilty, 14 Neb. 210. It is error in the court to render judgment for a sum of money. It should be that he is the reputed father; a finding by the jury that the defendant is the reputed father is not enough; it should find him guilty and the court adjudge him the reputed father, W. 564.

§ 5627. When putative father entitled to benefit of provisions of law relating to insolvent debtors. Such putative father, after having been confined in prison for the period of three months, for failing to comply with the order of the court provided for in the last section, shall be entitled to the benefits of the provisions of law relating to insolvent debtors, in the same manner as persons imprisoned for debt; but before such putative father shall receive or be entitled to such benefits, he shall give at least three days' notice to the complainant or her attorney of his intention to apply therefor. [72 v. 49, § 10.]

Discharge under insolvent law a defense to action on recognizance, W. 690. Father can not be discharged from maintenance by taking advantage of the bankrupt act; his effects in the hands of the commissioner of insolvents will be applied to the satisfaction of the order; mother has preference over assignee in bankruptcy, 13 O. 242.

§ 5628. Effect of death of mother upon prosecution, if child living. The death of the mother shall not abate the prosecution, if the child is living, but a suggestion of the fact shall be made, and the name of the child substituted upon the record for that of the mother, and a guardian *ad litem* appointed, who shall not be liable for costs; and in such case the testimony of the mother, reduced to writing before the justice, may be read in evidence. [70 v. 113, § 11.]

Defendant is not liable if child is still-born, 7 Rec. 566.

§ 5629. Effect of death of child upon prosecution, if mother living. The death of a bastard child shall not be cause of abatement, or bar to a prosecution for bastardy, if the mother is living; but the court trying the cause shall, on conviction, take the death into consideration, and give judgment for such sum as it deems just, the payment of which, or security therefor, may be enforced as above provided. [70 v. 113, § 13.]

Prosecution does not abate by death of the child, 19 O. S. 583.

§ 5630. Upon death of child after judgment, court may modify amount. Upon the death of a bastard child after judgment, and before the expiration of the time limited for the last payment on the judgment, the court which rendered the judgment may, on motion and notice, make such reduction in the amount of the same as is proper and just in consequence of such death. [70 v. 113, § 12.]

Where child dies, sureties on bond only liable for amount due at the time of the death of the child, with interest, W. 464.

§ 5631. Justice to furnish complainant transcript on failure of officer to arrest accused. When it appears from the return of the officer upon the warrant that the accused could not be arrested, the justice shall, upon demand, forthwith make a certified transcript of the proceedings had before him, including copies of the complaint and warrant, with the return thereon, and deliver the same to the complainant, or her agent or attorney. [70 v. 113, § 14.]

§ 5632. Order of attachment and grounds thereof. Upon the filing of the transcript mentioned in the preceding section, in the office of the clerk of the court of common pleas of the county in which the justice resides, an order of attachment shall be issued by the clerk, when there is filed in his office an affidavit of the complainant, her agent or attorney, showing:

First. That the complainant is the mother of a bastard child, or that she is pregnant with a child which, if born alive, will be a bastard.

Second. That the accused person is the father of such child.

Third. The existence of one or more of the following grounds:

1. That the accused is a non-resident of this state; or,
2. Has absconded with the intent to defraud complainant; or,
3. Has left the county of his residence to avoid the service of a warrant; or,
4. So conceals himself that a warrant can not be served upon him. [70 v. 113, § 15.]

§ 5633. Proceedings under attachment same as in civil actions. The order of attachment shall issue without an undertaking; the amount of property seized thereon shall not exceed one thousand dollars in appraised value; and attachments under this chapter shall be subject to the provisions of this title in reference to at-

tachments in civil actions, and be governed in all respects thereby. [70 v. 114, §§ 16, 17, 18.]

§ 5634. **Service by publication.** Upon the return of the order of attachment, service may be had by the publication, for six consecutive weeks, in some newspaper of general circulation in the county wherein the cause is pending, of a notice of the pendency of the proceeding, stating the object thereof, the substance of the complaint, and that an order of attachment has been issued and served therein; and in such case, copies of the complaint and order of attachment, with the return thereon, shall forthwith be deposited in the post-office, directed to the accused at his place of residence, unless it be made to appear to the court, by affidavit or otherwise, that such residence is unknown to the complainant, and could not, with reasonable diligence, be ascertained by her. [70 v. 114, § 19.]

§ 5635. **Personal service of copies of complaint when residence of defendant known.** If the defendant's place of residence is known, personal service of certified copies of the complaint and order of attachment, with the returns thereon, may be made at complainant's election, instead of service by publication; and the cause may be heard and determined at any time after the expiration of six weeks from the time of personal service, or the first publication of the notice provided for in the last section. [70 v. 115, § 19.]

§ 5636. **Order of court with respect to attached property.** If, upon such trial, the accused be adjudged to be the reputed father of the child, the court shall order that unless the defendant, within a day to be fixed by the court, pay the sum adjudged against him, with costs of prosecution, so much of the property remaining in the hands of the officer, after applying the money arising from the sale of perishable property, and so much of the personal property, and lands and tenements, if any, as may be necessary to satisfy such order, be sold, under the same restrictions and regulations as if the same had been levied on by execution; the money arising therefrom, with the amount that may be recovered from the garnishee, shall be subject to the order and control of the court, and be applied to satisfy such order in such sums and at such times as the court may order and direct; if there

be not enough to satisfy the same, the order of the court shall stand, and execution may issue thereon for the residue, in all respects as in judgments at law; and any surplus of attached property, or its proceeds, shall be returned to the defendant. [70 v. 115, § 22.]

Imprisonment, 3 C. C. 263.

§ 5637. Provision for prosecution of suits by persons interested in support of child. When a woman has a bastard child, and neglects to bring a suit for its maintenance, or commences a suit and fails to prosecute it to final judgment, the trustees of a township, or treasurer of a municipal corporation, interested in the support of such bastard child, or the directors of a county infirmary in which she becomes a charge, may, when sufficient security is not offered to save such county, township, or municipal corporation from expense, make complaint in behalf of such county, township, or municipal corporation, against him who is accused of begetting such child, or may take up and prosecute a complaint begun by the mother of such child. [70 v. 112, § 3.]

§ 5638. Who may recover on bond given in bastardy proceeding. The directors of the infirmary of a county, the trustees of a township, or the treasurer of a municipal corporation, in which a bastard child becomes a charge, may sue and recover upon any bond given to the state of Ohio in any proceeding against the reputed father of such bastard child; and the provisions of this chapter, and all the remedies herein allowed, shall apply to all classes [cases] in which the infirmary directors, trustees of townships, or treasurers of municipal corporations, are authorized to commence or prosecute a complaint against the reputed father of an illegitimate child. [70 v. 115, § 23.]

When such recognizances are forfeited the full amount of the penalty, with interest from the date of forfeiture, may be recovered without averring any loss or damage sustained by the mother of the child or the township where it was born, 23 O. S. 320; 29 O. S. 452.

CHAPTER IV.

CONTEMPTS OF COURT.

§ 5639. What contempts may be punished summarily. A court, or judge at chambers, may punish, summarily, a person guilty of misbehavior in the presence of or so

near the court or judge as to obstruct the administration of justice. [32 v. 17, § 1; S. & C. 258.]

W. 78, 421; 19 Bull 302; 21 Id. 404. Assaulting prosecutor, 3 C. C. 383; 19 Bull 181. Libelling judge during trial, 46 O. S. 473.

§ 5640. What acts are contempts of court. A person guilty of any of the following acts may be punished as for a contempt:

1. Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer.

2. Misbehavior of an officer of the court in the performance of his official duties, or in his official transactions.

3. A failure to obey a subpoena duly served, or a refusal to be sworn, or to answer as a witness, when lawfully required.

4. The rescue, or attempted rescue, of a person or of property in the custody of an officer by virtue of an order or process of court held by him.

5. A failure upon the part of a person recognized to appear as a witness in any court, to appear in compliance, with the terms of his recognizance. [32 v. 17, § 1.]

Refusal to pay alimony, 3 C. C. R. 419; 25 Bull 214; 23 Id. 38; of witness to answer question, 3 C. C. R. 263. Refusal of expert to testify unless paid extra compensation, 17 Bull 62. Military company exercising with music near court house, W. 78, 421. Refusal to abate nuisance, 32 O. S. 276; to submit to non-suit, W. 334; of excluded witness to withdraw, 39 O. S. 73. Attorney signing appeal bond in violation of rule of court, 60 O. S. 428; interfering with receiver without leave of court, 2 D. 336; 1 C. S. C. R. 188; 10 O. S. 372; fraudulent interference with files of court, 11 O. S. 681 (1 Cur. 122); misbehavior of officer in charge of jury, 10 O. 459; refusing to make return to writ of *habeas corpus*, 1 W. L. J. 168. Mandate requires lower court to punish contempt for disobedience, 41 O. S. 401. Defendant can not be imprisoned for contempt for failure to pay money as decreed or ordered, unless his conduct in refusing to obey is fraudulent, 6 O. S. 254, 262; nor where person having possession of the money claims to own it, 42 O. S. 109, 112; but a judgment debtor who fails to deliver property or money to a receiver according to an order made in proceedings in aid of execution when the judgment debtor by his own examination discloses that he has property or money which should be applied to the satisfaction of the judgment may be punished as for a contempt, 5 C. C. 78. To punish a witness for contempt in refusing to answer questions, no charges in writing are required. § 5252 gives

complete power and is independent of § 5640. The witness is not entitled to a trial by jury. The contempt is not a crime, 3 C. C. 263. Judges sitting at chambers can not punish as for contempt disobedience of peremptory writ of mandamus, 50 O. S. 194. Probate court can not punish for contempt failure or refusal of assignee in trust for creditors to perform order for payment of money, 27 Bull 289.

§ 5641. When accused entitled to be heard. In cases under the last section, a charge in writing shall be filed with the clerk, an entry thereof made upon the journal, and an opportunity given to the accused to be heard, by himself or counsel; but this section shall not be so construed as to prevent the court from issuing process to bring the accused party into court, or from holding him in custody, pending such proceedings. [75 v. 745, § 3.]

Charges must be stated in writing and accused have a chance to be heard, except for misbehavior in the presence of the court or near thereto, 9 O. S. 338 (1 Cur. 122).

§ 5642. Right of accused to bail. In proceedings under the second section [5640], if the writ is not returnable forthwith, the court may fix the amount of an undertaking to be given by the accused, with surety to the satisfaction of the sheriff; and upon the return of a writ, when it is not convenient to hear the charge without delay, the court shall fix the amount of an undertaking to be given, with surety to the satisfaction of the clerk, for the appearance of the accused to answer the charge. [75 v. 746, § 4.]

§ 5643. Bail bond to be given to satisfaction of clerk. Upon the execution of such undertaking, with surety to the satisfaction of the sheriff or clerk, the accused shall be released from custody. [75 v. 746, § 5.]

When the court awards a writ of attachment for contempt returnable to the next succeeding term and the sheriff having the writ in his hands arrested the party and took bail for his appearance, bail bond was valid, 4 O. 83.

§ 5644. Trial by the court. Upon the day fixed for the trial the court shall proceed to investigate the charge, and shall hear any answer or testimony which the accused may make or offer.¹ [75 v. 746, § 6.]

§ 5645. Punishment if found guilty. The court shall then determine whether the accused is guilty of the contempt charged; and if it be adjudged that he is guilty,

¹11 C. C. 389.

he may be fined not exceeding five hundred dollars, or imprisoned not more than ten days, or both. [75 v. 746, § 7.]

Punishment in excess of that fixed by this section may not be excessive, for this section refers to proceedings under § 5640 and not § 5639, 3 C. C. 383; 19 Bull 181; 46 O. S. 490.

§ 5646. **Imprisonment until order obeyed.** When the contempt consists in the omission to do an act which is yet in the power of the accused to perform, he may be imprisoned until he performs it. [75 v. 746, § 8.]

See § 5640n; 5 C. C. 82; 11 C. C. 389, 391.

§ 5647. **Proceedings when party released on bail fails to appear.** If the party be released on bail, and fail to appear upon the day named, the court may issue another order of arrest, or may order the undertaking for his appearance to be prosecuted, or both; and if the undertaking be prosecuted, the measure of damages in the action shall be the extent of the loss or injury sustained by the aggrieved party by reason of the misconduct for which the contempt was prosecuted, and the costs of the proceeding, and such recovery shall be for the benefit of the party injured. [75 v. 746, § 9.]

§ 5648. **Right of court who committed prisoner to release him.** When a person is committed to jail for contempt, the court or judge who made the order may discharge him from imprisonment when it appears that the public interest will not suffer thereby. [75 v. 746, § 10.]

Power of court to remit fines and imprisonment, 3 C. C. 263.

§ 5649. **Judgment final.** The judgment and orders of a court or officer made in cases of contempt may be reviewed on error; but proceedings in error therein shall not suspend execution of the order or judgment until there is filed by the person in contempt, in the court rendering the judgment, or in the court or before the officer making the order, an undertaking payable to the state of Ohio, with sureties to the acceptance of the clerk of that court, in an amount fixed by the reviewing court, or a judge thereof, conditioned that if judgment be given against him, he will abide and perform the order or judgment. [75 v. 746, § 11.]

Commitment a final order, 2 W. L. G. 193. Not appealable, 3

Bull 433 Reviewable on error, 46 O. S. 473. Court not obliged to fix amount of supersedeas bond because petition in error is pending to a sentence in contempt proceeding, 3 C. C. 383.

§ 5650. When the provisions of this chapter apply. This chapter is not cumulative to the provisions of division three, chapter three, of this title, nor of chapter five, title three, of this part, but furnishes a remedy in cases not thereby provided for [75 v. 746, § 12.]

CHAPTER V.

DISSOLUTION OF CORPORATIONS.

§ 5651. When corporation may petition for dissolution.

When a majority of the directors, trustees, or other officers having the management of the concerns of any corporation, or stockholders representing not less than one-third of the capital stock of any corporation, organized under the laws of the state, discover that the stock, property, and effects of the corporation have been so far reduced by losses or otherwise that it will not be able to pay all just demands to which it may be liable, or to afford a reasonable security to those who may deal with it, or deem it beneficial to the interests of the stockholders that the corporation be dissolved, or when such directors, trustees, or other officers are authorized, by a majority of the stockholders, to apply for a judgment as hereinafter provided, or when the objects of the corporation have wholly failed, or are entirely abandoned, or it is impracticable to accomplish such objects, they may apply to the court of common pleas of the county, or the superior court of the city or county in which the principal place of conducting the business of the corporation is situate, by petition, for the dissolution of such corporation, pursuant to the provisions of this chapter. [72 v. 138, § 1.]

Rights and obligations of building associations dissolved under this section, 3 C. C. 529. A court of equity in the absence of statutory power can not at the suit of a stockholder decree the dissolution of a corporation, 29 Bull 52; 2 C. C. 518; 21 Bull 38. Directors of railroad company ordered to pay costs of proceeding when, 29 O. S. 438. Dissolution necessary before receiver appointed, 5 C. C. 287.

§ 5652. What the petition must contain. Such application shall contain a statement of the reasons which induce the applicants to desire a dissolution of the corporation, and there shall be annexed thereto—

1. A full, just and true inventory of all the estate, both real and personal, in law and equity, of the corporation, and of all the books, vouchers, and securities relating thereto.

2. A full, just and true account of the capital stock, if any, of the corporation, specifying the names of the stockholders, their residence when known, the number of shares belonging to each, the amount paid in upon such shares respectively, and the amount still due thereon.

3. A statement of all the incumbrances on the property of the corporation, and of all engagements entered into by it which have not been fully satisfied or canceled, specifying the place of residence of each creditor, and of every person to whom such engagements were made, if known, and if not known, the fact to be so stated, and the sum owing to each creditor, the nature of each debt or demand, and the true cause and consideration of such indebtedness. [64 v. 153, § 2.]

Order not reviewable, 34 Bull 320.

§ 5653. **Affidavit to be attached to petition.** To every such petition there shall also be annexed an affidavit of the applicants, that the facts stated in the application, and the accounts, inventories, and statements contained therein or annexed thereto, are just and true, so far as they know, or have the means of knowing. [64 v. 153, § 3.]

§ 5654. **Notice of the pendency of the petition.** Upon such petition, accounts, inventories, and affidavit being filed, an order shall be entered requiring all persons interested in the corporation to show cause, if any they have, why it should not be dissolved, before some referee or master commissioner appointed by the court, and to be named in the order, at a time and place therein to be specified, not less than three months from the date thereof; and a notice of the contents of such order shall be published once in each week, for three weeks successively, in some newspaper published and of general circulation in the county wherein the principal place of business of the corporation is situate. [64 v. 153, §§ 4, 5.]

§ 5655. **Hearing before the master.** On the day appointed in the order, the referee or master shall proceed to hear the allegations and proofs of such parties, take testimony in relation thereto, and, with all convenient speed, report the same to the court, with a

statement of the property, effects, debts, credits, and engagements of the corporation, and of all other matters and things pertaining to its affairs. [64 v. 153, § 6.]

§ 5656. **When a judgment for a dissolution to be rendered.** When the report is made, if it appear to the court that the corporation is insolvent, or that a dissolution thereof will be beneficial to the stockholders, and not injurious to the public interest, or that the objects of the corporation have wholly failed, or been entirely abandoned, or that it is impracticable to accomplish such objects, a judgment shall be entered dissolving the corporation, and appointing one or more receivers of its estate and effects; and the corporation shall thereupon be dissolved and shall cease. [64 v. 153, § 7.]

§ 5657. **Who may be appointed receiver.** A director, trustee, or other officer of the corporation, or any of its stockholders, may be appointed a receiver; and a receiver shall, before entering upon the duties of his appointment, give such security to the state, and in such penalty, as the court shall direct, conditioned for the faithful discharge of the duties of his appointment, and for the due accounting for all money received by him. [64 v. 153, § 8.]

§ 5658. **Powers of receiver.** Such receiver shall be vested with all the estate, real or personal, of the corporation, from the time of his having filed the security hereinbefore required, and shall be trustee of such estate for the benefit of the creditors of the corporation, and its stockholders; and he shall have all the power and authority conferred by law upon trustees to whom assignments are made for the benefit of creditors. [64 v. 153, §§ 9, 10.]

The property and rights of the corporation pass to the receiver precisely in the same condition and subject to the same equities as they were held by the corporation, 43 O. S. 367, 368. Rights of creditor to bring action to recover property which has been fraudulently conveyed before dissolution when receiver has failed to act, 40 O. S. 575.

§ 5659. **Unpaid subscription to be collected.** If there be any sum remaining due upon any share of stock subscribed in the corporation, the receiver shall im-

mediately proceed and recover the same, unless the person so indebted is wholly insolvent, and for that purpose may commence and prosecute an action for the recovery of such sum, without the consent of any creditor of the corporation. [64 v. 153, § 11.]

§ 5660. Duties of trustees. The receiver shall, immediately on his appointment, give notice thereof, which shall contain the same matters required by law in notices of trustees of insolvent debtors, and in addition thereto it shall notify all persons holding any open or subsisting contract of the corporation to present the same to him, in writing, and in detail, at the time and place in such notice specified, which shall be published for three weeks in some newspaper printed and of general circulation in the county wherein the principal place of business of the corporation is situate. [64 v. 153, § 12.]

§ 5661. Transfers pending the action void. All sales, assignments, transfers, mortgages, and conveyances, of any part of the estate, real or personal, including things in action, of every description, made after the petition for the dissolution of the corporation is filed, in payment of or as security for any existing or prior debt, or for any other consideration, and all judgments confessed by such corporation after that time, shall be absolutely void as against the receiver appointed on such petition, and as against the creditors of the corporation. [64 v. 153, § 13.]

When proceedings for the dissolution of a building association are pending, an attempted assignment of a mortgage by the officers of a corporation, is void as against the receiver, 3 C. 529.

§ 5662. Duties of creditors and other persons. After the first publication of the notice of the appointment of a receiver, every person having possession of any property belonging to the corporation, and every person indebted thereto, shall account and answer to the receiver for the amount of such debt, and for the value of such property; and all the provisions of law in respect to trustees of insolvent debtors, the collection and preservation of the property of such debtors, the concealment and discovery thereof, and the means of

enforcing such discovery, shall be applicable to such receiver, and to the property of the corporation, except as otherwise provided herein. [64 v. 153, §§ 14, 15.]

§ 5663. Meeting of creditors. The receiver shall call a general meeting of the creditors of the corporation within four months from the time of his appointment, at which all accounts and demands for and against the corporation, and all its open and subsisting contracts, shall be ascertained and adjusted, as fully as may be, and the amount of money in the hands of the receiver declared, and he may settle controversies that arise between him and the debtors or creditors of the corporation by arbitrament or reference. [64 v. 153, §§ 15, 16.]

§ 5664. How contingent engagements discharged. If there be any open and subsisting engagements on contracts of the corporation which are in the nature of insurance, or contingent engagements of any kind, the receiver may, with the consent of the party holding such engagements, cancel and discharge the same by refunding to such party the premium or consideration paid thereon by the corporation, or so much thereof as shall be in the same proportion to the time which remains of any risk assumed by such engagements, as the whole premium bears to the whole term of such risk; and upon such amount being paid by the receiver to the person holding or being the legal owner of such engagement, it shall be deemed canceled and discharged as against the receiver. [64 v. 153, § 17.]

§ 5665. Receiver's compensation. The receiver shall, in addition to his actual disbursements, be entitled to such commissions as the court shall allow, not exceeding the sum allowed to executors or administrators, as well as reasonable counsel fees for services rendered him. [64 v. 153, § 18.]

§ 5666. Receiver to retain money for certain purposes. The receiver shall retain out of the money in his hands a sufficient amount to pay the sums which he is hereinbefore authorized to pay, for the purpose of canceling and discharging any open or subsisting en-

gagements; and if any suit be pending against the corporation or the receiver, for any demand, he may retain the proportion which would belong to such demand if established, and the necessary costs of the proceedings, to be applied according to the event of such suit, or to be distributed in a second or other dividend. [64 v. 153, §§ 19, 20.]

§ 5667. **How distribution to be made.** The receiver shall distribute the residue of the money in his hands in the payment of obligations of the corporation which have been exhibited by creditors, and ascertained, in the following order:

1. Debts entitled to a preference under the laws of the United States.

2. Mortgages, judgments, and other liens on the real estate of the corporation, in the order of their priority.

3. Debts which are liens upon the capital stock or property of the corporation, other than real estate, in the order of their priority, and the extent of the value of the stock or other property on which they are liens. [64 v. 153, § 21.]

§ 5668. **When dividend may be made.** The receiver may, from time to time, make dividends of the money in his hands, among the creditors of the corporation, until they are paid in full; but no dividend shall be made to the stockholders of the corporation, until after the final dividend to creditors; and if, after such final dividend is made, there remain any surplus in the hands of the receiver, he shall distribute the same among the stockholders of the corporation, in proportion to the respective amounts paid in by them severally on their shares of stock. [64 v. 153, §§ 22, 23.]

§ 5669. **Receiver to act on order of court.** The receiver shall be subject to the direction and control of the court as to the time of making dividends, both to the creditors and stockholders of the corporation, and as to the time of closing up the concerns of the corporation, and rendering his final accounts, and may be compelled to account at any time; and he may be removed by the court, and any vacancy created by

such removal, or by death, or otherwise, may be filled by the court. [64 v. 153, §§ 24, 25.]

§ 5670. Account of receiver to court. When required by the court the receiver shall render a full and accurate account of all his proceedings to the court, on oath, which may be referred to a referee or master commissioner to examine and report thereon; but before he renders any such account he shall insert a notice of his intention to present the same, once a week, for three consecutive weeks, in some newspaper printed and of general circulation in the county wherein the principal place of business of the corporation is situate, specifying the time and place at which such account will be rendered. [64 v. 153, §§ 26, 27.]

§ 5671. Report of referee on receiver's account. The referee to whom such account is referred shall hear and examine the proofs, vouchers, and documents offered for or against the same, and shall report thereon fully to the court; and when the report is made the court shall hear the allegations of all concerned therein, and shall allow or disallow the account, and may decree the same to be final and conclusive upon all the creditors of the corporation upon all persons who have claims against it, upon any open or subsisting engagement, and upon all the stockholders of the corporation. [64 v. 153, §§ 28, 29.]

§ 5672. Further duties of receiver. The receiver shall also account, from time to time, in the same manner, and with like effect, for all money which comes to his hands after such account is rendered, and for all money retained by him for any of the purposes hereinbefore specified, and shall pay into court all unclaimed dividends. [64 v. 153, § 29.]

§ 5673. Dissolution of manufacturing or mining company when stockholders petition therefor. When stockholders owning one-fifth or more of the paid up stock of a corporation organized for manufacturing or mining file in the office of the clerk of one of the courts mentioned in section *fifty-six hundred and fifty-one*, their petition, containing the statement that the corporation is insolvent, or that the dissolution thereof will be beneficial to the stockholders, or that the objects of the cor-

poration have wholly failed or been entirely abandoned, or that it is impracticable to accomplish such objects; or that the profits of the business are being diverted from the best interests of the stock-holders equally, or that the business of the corporation cannot be profitably conducted, and that they therefore desire a dissolution of the corporation, the court shall, if it deem it beneficial to the interest of the stock-holders, make an order requiring the officers of the corporation within reasonable time to file in court the inventories, accounts, and statements required by section ‡ 5652, and upon the filing thereof the court shall proceed as provided in section 5654, requiring all persons interested in the corporation to show cause, if any they have, why such corporation should not be dissolved, and the court shall, if it deem it beneficial to the interests of the stock-holders, adjudge the dissolution of the corporation in conformity with the provisions of this chapter, made upon finding that the statements contained in the petition are true, and upon such proceeding being had such other and further proceeding shall, in the judgment of the court, be had for the final settlement and adjustment of the affairs of the corporation as are hereinbefore provided should be had. [92 v. 138.]

Withdrawal of one of the petitioners—error to allow another stockholder to become party plaintiff and unite in the prayer and thus make up the required one-fifth of the stock, 6 C. C. 468. Right of receiver of national bank as against stockholder when not authorized to petition for dissolution under this section. When under this section a petition is filed for dissolution by persons claiming to be stockholders whose names are not registered in the books of the corporation as such, the holder of stock who as between himself and the corporation is not a legal owner, is not authorized by this section to petition for a dissolution, 26 Bull 39. Order not reviewable, 34 Bull 320.

‡ 5674. **How certain corporations may surrender charter.** When a majority of the directors, trustees, or other officers having the management of the concerns of any corporation, become satisfied that the objects of the corporation can not be accomplished, and no installment of the capital stock of the corporation has been paid, and no investments have been made, and no debts incurred which are unpaid, they, or the president of the board of directors, trustees, or other officers, may call a meeting of the stock-

holders, of the corporation, at such time and place as he or they may designate, by publication in some newspaper of general circulation in the county where in the principal office of the corporation is located; and if a majority in amount of the stockholders present at such meeting, in person or by proxy, decide that the objects of the corporation can not be accomplished, the corporation shall thereupon be dissolved, and shall cease. [66 v. 94, § 1.]

§ 5675. Directors at time of dissolution may settle affairs of corporation. Upon the dissolution of a corporation by the expiration of the term of its charter, or otherwise, and unless other persons be appointed by the legislature, or by the stockholders, directors, or trustees of the corporation, or by a court of competent authority, the directors, trustees, or managers of the affairs of such corporation, acting last before the time of its dissolution, by whatever name they may be known in law, and their survivors, shall be the trustees of the creditors and stockholders of the dissolved corporation, and shall have full power to settle the affairs of the same, collect and pay the outstanding debts, and divide among the stockholders the money and other property remaining, in proportion to the stock of each stockholder paid up, after the payment of debts and necessary expenses; the persons so constituted trustees may sue for and recover the debts and property of the dissolved corporation, by the name of the trustees of the corporation, describing it by its corporate name, and they shall be jointly and severally responsible to the creditors and stockholders of the corporation, to the extent of its property and effects that come into their hands; such trustees may be made or become parties to any action, by or against the corporation; and all liens of judgments existing at the time of the dissolution either in favor of or against the corporation, shall continue in force in the same manner as if the dissolution had not taken place. [40 v. 67, § 14; 48 v. 90, § 5.]

A warrant of attorney given to a bank for the entry of judgment may be used by the trustees provided by this section after its charter has expired, but the trustees must sue in their collective name and not in their individual names, 13 O. 250. In

proceedings against defunct corporations, service of process upon its last acting board of directors is sufficient under the statute to give the court jurisdiction, 20 O. S. 190.

§ 5676. When the last board is without a quorum. When the last board of directors or trustees of an expired or dissolved corporation becomes unable, by the refusal or neglect of a part of such trustees to act, or for want of a quorum, to act as trustees for closing the affairs of the corporation, any number of such last board of directors or trustees may apply to the court of common pleas of the proper county to declare vacant the places of such directors or trustees as refuse or neglect to act, and such court may empower the remaining directors or trustees, not less than two in number, or appoint any other number of persons, not exceeding three, to perform the duties of trustees under the preceding section. [47 v. 15, § 1.]

§ 5677. Petitions under preceding section. All applications made under the preceding section shall be by petition, and the court hearing the same may, on the same petition, make needful orders against any former trustees, or against any assignees of such corporation, for the conveyance of property by them held, and for the assignment of all rights in them vested, and also for the delivery of all books and papers touching the affairs of the corporation, which order may be enforced by process, or by its terms operate as a conveyance and transfer. [47 v. 15, § 2.]

§ 5678. Trustees appointed succeed to rights of predecessors. The trustees so appointed, and all successors of such trustees, shall succeed to all the rights vested in their predecessors, whether trustees or assignees; and all securities and effects by them held or acquired, and all judgments recovered, whether in favor of the corporation to which they succeed, or in the names of the trustees of such corporation, shall inure to the succeeding trustees, and pass by operation of law as fully as if the same were assigned. [47 v. 15, § 3.]

§ 5679. No action shall abate by dissolution of corporation. No action pending in any court in favor of

or against any corporation shall be discontinued or abate by the dissolution of the corporation, whether the dissolution occur by the expiration of its charter or otherwise; but all such actions may be prosecuted to final judgment by the creditors, assignees, receivers, or trustees having the legal charge of the assets of the corporation, in its corporate name. [41 v. 52, § 1; 40 v. 67, § 14.]

For decisions under former statutes, see 13 O. 263, 298; 2 O. S. 167; 12 O. S. 577.

§ 5680. Judgments by or against such corporations may be enforced. Upon all judgments in favor of or against any such corporation, whether such judgments exist at the time of the dissolution, or are obtained afterward in actions pending at the time of the dissolution, execution may be had, and satisfaction or performance of the same enforced, by the creditors, assignees, receivers, or trustees having the legal charge of the assets of the dissolved corporation, in the corporate name of the dissolved corporation. [41 v. 52, § 2.]

§ 5681. Title of property of corporation to pass to trustees. The title to all real estate belonging to any such corporation shall, at the time of the dissolution of the same, pass to the trustees of the corporation, who may sell and dispose of the same in such manner, and upon such terms, as they deem best for the interest of the creditors and stockholders, and, upon any such sale, make a good and sufficient deed therefor. [41 v. 52, § 4.]

Easements of canal company revert to former owners, 44 O. S. 406; 1 C. C. 239.

§ 5682. Trustees personally liable for an abuse of trust. The trustees of any such corporation shall be subject to the control of the court of common pleas, and be liable to be sued on behalf of any person interested, on account of any neglect or omission of duty, or abuse of trust; in case of the removal of any such trustee by the court for an abuse of trust, it may appoint a suitable person to fill the vacancy; and any such trustee may, for reasonable cause, upon the application of any creditor or stockholder, be re-

quired by the court to give bond and security, in such amount, and subject to such conditions, as it may direct. [41 v. 52, § 5.]

§ 5683. Dissolved corporation may prosecute action in its own name. A corporation may, at any time after its dissolution, whether the dissolution occur by the expiration of its charter or otherwise, prosecute any action in and by its corporate name, for the use of the party entitled to receive the proceeds of such action, upon any and all causes of action accrued, or which, but for such dissolution, would have accrued, in favor of the corporation, in the same manner, and with the like effect, as if it were not dissolved. [48 v. 90, § 1.]

§ 5684. May be sued by corporate name; service of process. Any such dissolved corporation may be sued by its corporate name, for or upon any cause of action accrued, or which, but for the dissolution, would have accrued against it, in the same manner, and with the like effect, as if it were not dissolved; and all process by which an action is instituted against such corporation may be served by the sheriff, or other proper officer, by delivering to any one of the assignees, trustees, receivers, or persons having charge of its assets, a copy thereof, or by leaving such copy at the residence of any such assignee, trustee, receiver or person.¹ [48 v. 90, § 2.]

§ 5685. Judgment for or against may be revived. Judgments in favor of or against a dissolved corporation, whether rendered before or after its dissolution, and which become dormant, may be revived in favor of or against it, as the case may be, in and by its corporate name, in the same manner, and with the like effect, as if the corporation were not dissolved; and in all cases of such judgments against any such corporation, the writ of summons or other process shall be served in the manner prescribed in section *fifty-six hundred and eighty-four*. [48 v. 90, § 3.]

§ 5686. Error may be prosecuted on judgments for or against. Petitions in error upon judgments may be prosecuted in favor of or against any such dissolved

¹35 Bull 129.

corporation, and by its corporate name, in the same manner, and with the like effect, as if it were not dissolved; and process thereon against it shall be served in the manner prescribed in section *fifty-six hundred and eighty-four*. [48 v. 90, § 4.]

§ 5687. **Directors may appoint trustees to settle affairs of corporation.** The board of directors or other officers having the control and management of any corporation in this state, may appoint three trustees to adjust and settle the affairs of such corporation, and the trustees so appointed shall be authorized to use the corporate name of the corporation, for such period as may be necessary for the adjustment and settlement of its affairs, by suit or otherwise. [50 v. 272, § 2.]

§ 5688. **Removal and duties of trustees.** The trustees so appointed shall report annually to the stockholders of the corporation a full and succinct statement of its affairs; and a majority in interest of the stockholders may remove a trustee, or appoint a person to a vacancy occasioned by the death, resignation, or removal of a trustee. [50 v. 272, §§ 3, 4.]

CHAPTER VI.

DIVORCE AND ALIMONY.

§ 5689. **For what causes divorce may be granted.** Courts of common pleas may grant divorces for the following causes:

1. That either party had a husband or wife living at the time of the marriage from which the divorce is sought.

2. Willful absence of either party from the other for three years.

3. Adultery.

4. Impotency.

5. Extreme cruelty.

6. Fraudulent contract.

7. Any gross neglect of duty.

8. Habitual drunkenness for three years.

9. The imprisonment of either party in a penitentiary

under sentence thereto; but the petition for divorce under this clause shall be filed during the imprisonment of the adverse party.

10. The procurement of a divorce without this state, by a husband or wife, by virtue of which the party who procured it is released from the obligations of the marriage, while the same remain binding upon the other party. [51 v. 377, §§ 1, 2; S. & C. 509, 511.]

A petition for divorce should allege: 1. That the plaintiff, at the time of filing the petition, is an actual resident of the county where it is filed. 2. That he or she had a *bona fide* residence in the state at least one year before the application. 3. The time and place of marriage, and the names and ages of the children, if any. 4. A specific brief statement of the cause of praying for divorce. 5. If alimony be sought for, the petition should set out, as near as may be, the kind and amount of the personal property, and describe the real estate, of the defendant, 5 O. 538. The district court has no jurisdiction to review on error the proceedings of the court of common pleas in cases of divorce and alimony, 6 O. S. 64. Appeal lies in cases of alimony, ‡ 5706. A decree for divorce may be set aside for fraud, 7 Bull 20, but not in an action commenced at a subsequent term, 9 O. S. 534; 11 Bull 10; 34 Bull 189; but see 12 Bull 33; for want of jurisdiction, *Id.* Decree in the nature of judgment *in rem*, 44 O. S. 657; conclusive on third persons, *Id.*

1. W. 156 s. c. 5 O. 539; 19 O. S. 588.

2. *Willful absence*, W. 138, 147, 210, 225, 226, 454, 470, 719. It must be willful on the part of the defendant, W. 469, against the will of plaintiff, W. 475, 636, without plaintiff's fault, W. 416, and for three years after abandonment of intention to return, W. 224. It is not sufficient if the wife leaves for want of support, W. 455, see 8 Bull 88, 89.

3. *Adultery*. The petition must state the time and place of the act, 5 O. 538; W. 643; the name of the person with whom the offense was committed, or allege a good excuse for the omission, W. 98, 210, 284, 302; 5 O. 538. A divorce will not be granted where the applicant is living in adultery, 2 O. 233; nor on the application of the husband when the wife, seduced, married, and abandoned by him, commits adultery, 2 Bull 47; 5 Rec. 674. The general reputation of plaintiff is admissible in evidence, and may defeat the action, 2 O. 233; W. 283, but not that of defendant, W. 283. Adultery may be proved by circumstances, W. 148. It can not be proved under a general charge, W. 636. Sufficient proof of adultery, see W. 156, 161, 454, 469, 514, 559, 643; 7 Bull 304.

4. *Impotency*, W. 518.

5. *Extreme cruelty*, W. 244, 557; 3 W. L. G. 186; 1 Bull 153. Specific acts must be stated, W. 563. It formerly consisted of acts of personal violence only, W. 563, and words were not sufficient, W. 212; but profane and abusive language, and charges of a want of chastity, made in the presence of plaintiff and others, have been held sufficient, 15 Bull 113; see 30 Kas. 712 s. c. 10 Bull 409; 32 Kas. 744; 33 Kas. 1. Subjection of wife to excessive sexual intercourse, see 11 Bull 169-173. Wife guilty of, 1 Bull 153; 30 Kas. 712; 10 Bull 409; generally, 8 Bull 88, 89.

6. *Fraudulent contract*. Pregnancy as a ground for divorce, W. 630; 10 Bull 95; 205 (citing cases). Congenital imbecility renders a marriage contract void *ab initio*. It was alleged in the action

by the imbecile's guardian that the contract was procured by fraud, 22 O. S. 271. Fraudulent representations as to name, respectability, connections, and wealth of party, are not sufficient, 4 Bull 368; generally, 31 Bull 141.

7. *Any gross neglect of duty*, 1 Bull 163; see 1 Clev. R. 148. The particular duties neglected must be stated, 1 Bull 164. Mere failure to support is not, 8 Bull 88, 89, when the wife has means, 7 Bull 302, 303; nor willful absence, 1 Bull 163; 8 Bull 88. That she is enabled to eke out a support through the kindness of relatives does not mitigate the offense, 8 Bull 86; but three years' failure to support, when defendant is able to do so, may be, 3 W. L. M. 328. It can not be proved by showing adultery, W. 763.

8. Under California statute, see 44 O. S. 645.

9. W. 627.

10. *Foreign divorce* of Ohio parties held void, 37 O. S. 317; held valid, 7 O. (Pt. 2.) 238; held valid as to divorce, but not as to alimony, 19 O. S. 502; see 16 Bull 359; 44 O. S. 449. Criticism, 13 Bull 3; 15 Bull 232; 17 Bull 2.

§ 5690. Residence of plaintiff. Where petition to be filed. The plaintiff, except in an action for alimony alone, shall have been a resident of the state at least one year before filing the petition; all actions for divorce, or for alimony, shall be brought in the county where the plaintiff has a *bona fide* residence at the time of filing the petition, or in the county where the cause of action arose; and the court shall hear and determine the same, whether the marriage took place, or the cause of divorce occurred, within or without the state. [70 v. 258, § 8.]

Right of a woman divorced by *ex parte* proceedings in another state to apply in this state for alimony only, 44 O. S. 455. A decree of divorce under a statute of another state, authorizing a divorce between husband and wife, neither of whom is domiciled therein, is of no force or effect in this state, where the parties have their domicile, 37 O. S. 317; generally, 1 Bull 164.

§ 5691. Residence of wife not to be affected by that of husband. When a wife files her petition for a divorce, or for alimony, the residence of her husband shall not be so construed as to preclude her from the provisions of this chapter. [51 v. 377, § 12; S. & C. 514.]

§ 5692. Service when defendant resident of the state. When the defendant is a resident of this state, the clerk shall issue a summons, directed to the sheriff of the county in which he or she resides, or is found, which, together with a copy of the petition, shall be served on the defendant at least six weeks before the hearing of the cause. [54 v. 131, § 3; 70 v. 258, § 8; S. & C. 511.]

§ 5693. Notice when defendant's residence unknown. When the defendant is not a resident of this state, or his

residence is unknown, notice of the pendency of the action must be given by publication, as in other cases; and unless it be made to appear to the court, by affidavit or otherwise, that his residence is unknown to the plaintiff, and could not, with reasonable diligence, be ascertained, a summons, and a copy of the petition, shall forthwith, on the filing of the petition, be deposited in the post-office, directed to the defendant at his place of residence. [54 v. 131, § 3; S. & C. 511.]

See 5 O. 318 (act 1824).

Personal service out of the state, 29 Bull 98.

§ 5694. When cause may be heard. The cause may be heard and decided at any time after the expiration of six weeks from the service of summons, or the first publication of notice. [54 v. 131, § 3; S. & C. 511.]

§ 5695. Answer, hearing, and judgment. If the defendant fail to appear, or, having appeared, admit or deny in his answer the allegations in the petition, the court shall thereupon proceed to hear and determine the cause; and if, upon the hearing, any of the causes for divorce charged in the petition be proven to the satisfaction of the court, it may pronounce the marriage contract dissolved, and both of the parties released from the obligations thereof. [51 v. 377, § 4; S. & C. 512.]

Confessions of the parties are not evidence, W. 212, 354, but conversations are when part of the *res gestæ*, W. 632. Depositions without notice can not be read, 5 O. 538; W. 632. Appearance by counsel is insufficient, 2 W. L. J. 427.

§ 5696. Divorce not to affect legitimacy of children. The granting of the divorce, and the dissolution of the marriage, shall in no wise affect the legitimacy of the children of the parties thereto; and the court shall make such order for the disposition, care, and maintenance of the children, if there are any, as is just and reasonable. [51 v. 377, § 4; S. & C. 512.]

A separate action may be brought by wife for the maintenance of minor child subsequent to decree of divorce, 45 O. S. 452; *contra*, 9 Bull 55; but not if divorce is for wife's aggression, 52 O. S. 229; 6 C. C. 512. The jurisdiction with respect to the custody of children is continuing. The order in that respect may be modified, although there was no reservation in the original order to that effect, 15 O. S. 427; 8 C. C. 363; 38 O. S. 558; 51 O. S. 1. Rights of parents as to custody and control of children, see act April 14, 1898, 90 v. 186.

§ 5697. Pleadings. Competency and effect of testimony and admissions of the parties. Pleadings under

this chapter need not be verified, and a divorce, or a judgment for alimony shall not be granted upon the testimony or admissions of a party unsupported by other testimony, nor shall any admission be received which the court has reason to believe has been obtained by fraud, connivance, coercion or other improper means, but the parties shall, notwithstanding their marital relation, be competent to testify in actions and proceedings under this chapter as fully and to the same extent that any other witness might. [88 v. 531; 51 v. 377, §§ 4, 5; S. & C. 512.]

See § 5697. Where the ground of divorce has been conceded, the testimony of the wife as to subsequent acts relied on to revive the ground of divorce must be corroborated, 29 Bull 156. Judgment for alimony, 50 O. S. 480.

§ 5698. **Evidence of marriage.** Proof of cohabitation, and reputation of the marriage of the parties, shall be competent testimony to prove such marriage, and may be, within the discretion of the court, sufficient evidence thereof. [51 v. 377, § 6; S. & C. 512.]

Marriage provable by parol, 1 Bull 164.

A marriage solemnized in due form is presumed to be lawful, until some enactment which annuls it is produced and proved by those who deny its validity, 32 O. S. 168.

§ 5699. **Rights of parties when divorce granted for oppression of husband.** When a divorce is granted by reason of the aggression of the husband, the wife shall, by force of the judgment of divorce, be restored to all her lands, tenements and hereditaments, not previously disposed of, and the husband shall be barred of all right of dower therein, and if she so desire, the court shall restore to her any name she had before such marriage; she shall be allowed such alimony out of her husband's real and personal property as the court deems reasonable, having due regard to the property which came to him by marriage, and the value of his real and personal estate at the time of the divorce, which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or installments, as the court deems just and equitable; (1.) and if the wife survives her husband, she shall also be entitled to her right of dower in the real estate of her husband not allowed to her as alimony, of which he was seized at any time during the cover-

ture, and to which she had not relinquished the right of dower; (2.) but in any case, when it appears to the court that the husband is the owner of but little or no property or means, and the wife is the owner of lands or personal estate, or both, the court may adjudge to the husband such share of the wife's real or personal property, or both, or may decree to him such sum of money out of her estate, payable in gross, or in installments, as the court deems just and reasonable, having due regard to all the circumstances of the parties. [91 v.349.]

1. History of legislation—dormancy of decree, 21 Bull 277. Alimony may be decreed a wife as against a bigamist, 19 O. S. 588, and where an *ex parte* foreign divorce had been granted, 44 O. S. 449, though invalid, 19 O. S. 502, and on refusal of divorce, W. 632, in case of abandonment, W. 491; was allowed an adulteress where there was hope of reclamation, and the property was earned by the parties jointly, W. 514. Real property may be decreed a wife as alimony in fee, 21 O. S. 657; or an estate in remainder, 47 O. S. 501; on growing crops, 47 O. S. 544; in fact, all the title that the husband had in the premises becomes vested in her by force of the decree, 36 O. S. 590, and the court may, in decreeing her alimony, take into consideration property acquired by the husband by inheritance since the date of an *ex parte* foreign divorce, 20 O. S. 439. When alimony is decreed her in installments, execution may be had for the installments as they become due, 9 O. S. 37; but the installments should be limited to the husband's lifetime, 34 O. S. 1. Refusal to pay punishable by contempt: attachment against husband, 25 Bull 214. The allowance may be increased on account of the ill-health of the wife, 32 O. S. 33, and successive allowances may be made pending suit or appeal, 38 O. S. 370; and the removal of the wife from the state and her remarriage, pending an appeal, will not deprive the appellate court of power to decree her alimony, 38 O. S. 370; but her remarriage, pending suit, to a man financially able, and who does in fact support her, would be *prima facie* good cause for modifying a former decree so as to reduce the amount, 43 O. S. 499. Additional alimony can not be allowed after final decree, 28 O. S. 596. Petition for modification to be filed in common pleas, 11 C. C. 1.

A decree for alimony does not operate as a lien on the real estate of the husband unless made a charge thereon by the decree itself, 10 O. S. 268; and, when so made, it has no priority over that of other creditors, 24 O. S. 488; but where, in an action for divorce and alimony, there has been an injunction *pendente lite* to prevent alienation, a decree for alimony made a lien upon the premises is superior to the lien of a mortgagee who had actual notice of the proceedings and whose mortgage was executed and recorded pending those proceedings, 30 O. S. 579. It operates as a lien on the real estate in the county where it is rendered, and can be enforced by execution levied on such lands when they have been conveyed by husband after the decree was rendered, 4 C. C. 231; 29 Bull 418; and the estate continues subject to the lien after his death, *Id.* 313. The court first ac-

quiring jurisdiction can alone decree as to the *custody of children*, 9 Bull 271, and when once acquired the jurisdiction continues, 15 O. S. 427; 38 O. S. 370, 558. Attorney's fees allowed when alimony decreed *pendente lite*, W. 120. Acceptance of part in full satisfaction of decree awarding alimony, estoppel, 11 Bull 191. Husband's imbecility no ground for recovery, 3 Bull 738. A final order, 1 D. 299. Allowance of temporary alimony by judge at chambers a final order, 38 O. S. 370. She is not entitled to dower in same lands allowed her as alimony, 31 Bull 155.

2. *Dower on surviving husband.* 4 Bull 645; 2 Clev. R. 274. A married woman divorced by reason of the aggression of her husband, and who subsequently marries another man during the life of her first husband, if she survives the latter will be entitled to dower in the real estate of which the first husband was seized at any time during coverture, 44 O. S. 645; see 46 O. S. 78; 20 O. S. 454; 9 C. C. 191; contra, 10 O. S. 596 (act 1824). Woman divorced from husband to whom his lands allowed as alimony not entitled to dower in such lands, 51 O. S. 207. Divorced by decree of another state for her aggression, is not entitled to dower, 9 Bull 159.

§ 5700. *Rights of wife and husband when divorce granted for her aggression.* When the divorce is granted by reason of the aggression of the wife, she shall be barred of all right of dower in the lands of which her husband is seized at the time of filing the petition for divorce, or which he thereafter acquires, whether there is issue or not; and the effect of the judgment of divorce shall be to restore to her the whole of her lands, tenements, or hereditaments not previously disposed of, and not allowed to her husband as alimony, subject to the dower right of her husband therein, and the court may adjudge to her such share of the husband's real or personal property, or both, as it deems just and reasonable; or the husband shall be allowed such alimony out of the real and personal property of the wife as the court deems reasonable, having due regard to the property which came to the wife by marriage, and the value of her real and personal estate at the time of the divorce, which alimony may be allowed to him in real or personal property, or both, or by decreeing to him such sum of money, payable either in gross or in installments, as the court deems just and equitable; and if the husband survives his wife, he shall also be entitled to his right of dower in the real estate of his wife not allowed to him as alimony, of which she was seized at any time during the coverture, and to which he had not relinquished his right of dower. [90 v. 30; 51 v. 377, § 7; S. & C. 512.]

The provisions of this section do not apply to divorces in another state, 10 O. 28; see 9 Bull 159; 31 Bull 43.

§ 5701. Application for alimony pendente lite. The court or a judge thereof in vacation may, on notice to the opposite party of the time and place of the application, grant alimony to either of the parties for his or her sustenance and expenses during the suit, and an allowance for the support of minor children dependent upon either party for support and not provided for by such party during the pendency of the action for divorce, or alimony alone. (1.) When an appeal is taken by either party to the circuit court, that court, or a judge thereof in vacation, may grant like alimony and support during the pendency of the appeal, upon like notice. (2.) Any person or corporation having possession or control of or claiming any interest in any property, real or personal, of the party out of which the other party seeks alimony, may be made a party defendant. (3.) When it is made to appear to the court, or a judge in vacation, that a party is about to dispose of or encumber his or her property, or any part thereof, so as to defeat the other party in obtaining alimony, such court or judge may allow an injunction to prevent the same, with or without bond at discretion; and the party may sell and assign the order for alimony or allowance after the same is made. (4.) [91 v. 349.]

Contempt for non-payment of alimony, 3 C. C. 419; 11 Id. 389.

1. See § 5699, notes; W. 104, 120, 308; and attorney's fees will be allowed, W. 120. But the husband is not liable for necessities if he is not in default for payment of alimony, 32 O. S. 33; 5 Bull 794. The adequacy of the alimony can not be collaterally impeached by a stranger, 32 O. S. 33. 2. The allowance by a judge of the court of common pleas, as a judge of the district court, of temporary alimony pending an appeal as to permanent alimony, is not a bar to another allowance by such judge pending such appeal; and the signature of the judge to the order, or journal entry thereof, is not essential to the validity of the order, 38 O. S. 370. 3. A third person made defendant in the action, on the ground that he had property of the husband which ought to be charged with alimony, can appeal so much of the case as affects his interest, 15 O. 404. 4. Injunction against alienation is *lis pendens*, 80 O. S. 579; see Attorney's Fees, 3 C. C. R. 107.

§ 5702. Causes for which alimony allowed. Cross-petition. When the wife files her petition for divorce or alimony, the husband may file a cross-petition for divorce, upon either cause mentioned in § 5689; the wife may file her petition for alimony alone, or, if a petition

for divorce has been filed by the husband, she may file her cross-petition for alimony, with or without a prayer for the dissolution of the marriage contract; and such petition or cross-petition for alimony may be for the following causes:

1. Adultery.
2. Any gross neglect of duty.
3. Abandonment of the wife without good cause.
4. That there is a separation in consequence of ill-treatment on the part of the husband, whether the wife is maintained by the husband or not.
5. Habitual drunkenness.
6. Sentence to and imprisonment in a penitentiary; in which case the application must be made while the husband is so confined. [54 v. 131, § 10; S. & C. 513.]

See § 5689, notes. Petition for alimony alone sustained where an *ex parte* foreign divorce was granted, 44 O. S. 449, though the foreign divorce was invalid, 19 O. S. 502; see 13 Bull 3; 15 Bull 232; 17 Bull 2. Defendant cross-petitioner need not issue summons to plaintiff, 9 Bull 24.

§ 5703. Proceedings on petition for alimony alone. The court shall, upon satisfactory proof of any or all of the charges in the petition, make such order for the disposition, care, and maintenance of the children of such marriage, if there are any, as is just and reasonable, and give judgment in favor of the wife for such alimony out of her husband's real and personal property as is just and equitable, which may be allowed to her in real or personal property, or both, or in money, payable either in gross or in installments; and the effect of such judgment shall be to restore to the wife all her lands, tenements, and hereditaments not previously disposed of, and to vest in her the right and power to acquire, hold, manage, and dispose of property, money, and choses in action, and to bring and maintain suits in her own behalf, free from the control or interference of her husband, unless the court, for good cause, vest such property or powers in trustees, for her use and benefit. [51 v. 377, § 11; S. & C. 514.]

See §§ 5699, 5702, notes. Lien of decree, 50 O. S. 476.

A party to a decree for alimony may, by an original petition and suit, obtain a modification of such former decree, upon proper allegations of the changed condition and circumstances of the parties, 43 O. S. 499.

§ 5704. Change of venue. Upon application of a party, and his or her affidavit that a fair and impartial

hearing and determination can not be had before the court in which a petition for divorce or alimony is filed, a change of venue shall be allowed, and the cause removed to any county of the same judicial district for hearing and determination. [51 v. 377, § 13; S. & C. 514.]

§ 5705. Injunction to prevent husband from disposing of property, etc. A married woman may file her petition in the court of common pleas, setting forth that her husband, from habitual intemperance, or any other cause, is about to waste and squander the property, legal or equitable, money, credits, or choses in action, to which she is entitled in her own right, or any part thereof, or is proceeding, or about to proceed, fraudulently to convert the same, or any part thereof, to his own use, for the purpose of placing the same beyond her reach, and depriving her of the benefit thereof, and the court may enjoin the husband from disposing of, or otherwise interfering with, such property, money, credits, or choses in action, and may appoint a receiver to manage and control the same for the benefit of the wife, and may also make such other order in the premises as it deems just and proper; upon the filing of the petition, a provisional injunction may be allowed as in other cases, with or without bond, at discretion; and such petition shall be filed in the county where the petitioner resides, and the husband made a party defendant in the same manner as in the case of a petition for a divorce. [51 v. 377, § 14; S. & C. 514.]

§ 5706. Appeal. No appeal shall be allowed from any judgment or order of the court of common pleas under this chapter, except from an order dismissing the petition without final hearing (1), or from a final order or judgment granting or refusing alimony (2), or in cases under § 5705; when judgment is rendered for both divorce and alimony, the appeal shall apply only to so much of the judgment as relates to the alimony (3); and when an appeal is taken by the wife, she shall not be required to give bond. [75 v. 751; 54 v. 131, § 17.]

1. Order requiring father to pay mother monthly stipend for support of children not appealable, 51 O. S. 1. Appeal lies in cases of divorce when the petition is dismissed without hearing, 4 Bull 368; it did not lie in 1846, 15 O. 404, nor in 1856, 6 O. S. 64, nor in 1859, 10 O. S. 369. 2. Appeal lies from alimony alone under act of 1857, 25 O. S. 71, but not from alimony *pendente lite*, *Id.* Where a petition for alimony was dismissed on final hearing in the common pleas, the case was not appealable to the district court in 1867, 17 O. S. 563. 3. 19 O. S. 502.

CHAPTER VII.

DOWER.

§ 5707. **How heir may assign dower.** When the lands of a deceased person are not incumbered by mortgage, or by judgment obtained against such decedent during life, the heir, or guardian of any heir or other person having the next immediate estate of inheritance, may assign to the widow or widower dower therein by writing, under his hand, particularly describing the same, which, if approved in writing on the deed of assignment, by the probate judge of the county, and also by the probate judge of the county appointing such guardian, and accepted by the widow or widower in writing thereon, shall be a good assignment in law. [86 v. 184.]

Dower of widow or widower. § 4188. "A widow or widower who has not relinquished or been barred of the same, shall be endowed of an estate for life in one-third of all the real property of which the deceased consort was seized as an estate of inheritance at any time during the marriage, and in one-third of all the real property of which the deceased consort, at decease, held the fee simple in reversion or remainder; and also in one-third of all the title or interest that the deceased consort had, at decease, in any real property held by article, bond, or other evidence of claim; and the widow or widower may remain in the mansion house of the deceased consort, free of charge, for one year, if dower is not sooner assigned; but dower shall not be assigned to any widow or widower in any real property of which the deceased consort, at decease, held the fee simple in reversion or remainder, until the termination of the prior estate."

Conveyance in lieu of dower, etc. § 4189 provides for a conveyance in lieu of dower, to take effect on grantor's death, which, if accepted, bars the grantee's right of dower, unless the grantee is within the age of minority, or the conveyance is made during marriage, when the grantee may waive the title to such real property and demand dower.

§ 4190. That, when such conveyance proves defective, dower may be demanded; § 4191, that she shall be endowed of so much of the residue of the real property of the deceased consort as will equal that from which such widow or widower is evicted; § 4192, that adultery bars dower, unless condoned; § 4193, that if a husband or wife gives up any real property by collusion or fraud, or lose the same by default, the widow or widower may recover dower in the same; § 4194, that dower is forfeited by waste. The act (84 v. 135) abolishes the estate by the *curtesy* saving vested rights.

Under decided cases a widow is dowerable in land mortgaged by husband and wife when the mortgage debt is paid, 16 O. S. 193; 28 O. S. 503, or in entire proceeds after payment of mortgage debt on foreclosure, 40 O. S. 391; 8 O. S. 234; see 10 C. C. 59; 32 Bull 882; in equity of redemption owned by husband at his death, 1 D. 121; in surplus in foreclosures, 21 O. S. 509; 27 O. S. 464, 512; 32 Id. 210; in surplus after paying charge on land devised, 39 O. S. 172; dow-

able in wild land, 8 O. 418. Dower is allowed only to widow who was wife of person dying at the time of his death, 10 O. S. 596; 20 O. S. 454; 9 Bull 159, unless she has been divorced for his aggression, when she is entitled to dower if she survives him, though she marries again, § 5699, notes. She is *not dowerable* in lands sold for taxes, 8 O. S. 430; in dedicated property, 3 O. 24; in stock in railroad company, 1 O. S. 350; in land of husband subject to devise over in case of his dying before his brother, 12 Bull 90; in perpetual lease not owned by husband at his death, 2 Bull 92; see 7 Id. 159; in trust estates, 8 O. 412; in partnership lands of insolvent firm, 1 O. 535; 8 O. 328; in lands of which husband had but a vested remainder in fee at the time of his death, and of which the freehold had not then terminated, 2 C. C. R. 136 (act 1843). Lien for purchase money is superior to dower, 22 O. S. 435, though secured by mortgage, 9 O. S. 331; 27 O. S. 512; 1 D. 121; 2 C. C. 70; 4 Id. 316; land granted for school purposes, 31 Bull 84.

Dower is barred by adultery, § 4192; by divorce for wife's aggression, § 5700 (but not by such divorce in foreign state, 10 O. 27); by joining with husband in granting part of deed, 16 O. 191; 7 O. (Pt. 1) 194; by sale by administrator on mortgage of husband and wife, 9 O. 15; forfeited for waste, 21 O. S. 362; barred by electing to take under husband's will, 45 O. S. 203; 7 C. C. 338; see 2 N. P. 232. It is not barred by deed of husband and wife in which she does not join in the grant or release dower, 3 O. S. 75; nor by fraudulent conveyance of her and her husband, 5 O. S. 70; 23 O. S. 294; nor by foreclosure, 15 O. S. 485; nor by divorce for his aggression, § 5699, though she marries again, 44 O. S. 645; *contra* 10 O. S. 596 (under act 1824). Estoppel to claim dower, 3 O. 5; 33 O. S. 155. Waiver of provision made by husband in lieu of dower, 39 O. S. 642. Her year's support is not barred by a provision for "all claims on the estate," Id. Unassigned dower may be subjected to payment of her debts, 41 O. S. 540. Wife dowerable only in portion assigned to husband in partition, 27 Bull 195. Release of contingent right of dower does not inure to benefit of husband's subsequent judgment creditors, 46 O. S. 407. Where she joins in mortgage with her husband she may have the value of her contingent right of dower in the entire proceeds ascertained and husband's entire interest exhausted to pay the debt before resorting to her interest, Id., see 4 C. C. 296; 544. Release may be made to owner of fee but not to a stranger or one who has parted with his interest, 22 Bull 254. When a necessary party in foreclosure, 2 C. C. 70; 4 Id. 316. Release in assignment for creditors does not inure to assignee in bankruptcy, 20 Bull 401. Husband may subject his interest in wife's property for his support, 6 C. C. 491. A widow electing not to take under will can take nothing by virtue of the bequests made to her by the will in lieu of dower, 33 O. S. 572. When dower is barred by a legal jointure, an election under § 43 of the wills' act is not necessary to entitle the widow to take the provisions made for her in her husband's will, 84 O. S. 164. Tax sale, 9 C. C. 647.

§ 5708. *Petition for dower.* A widow or widower may file a petition for dower in the common pleas court, against the heir, or other person having the next immediate estate of inheritance, or any other estate or interest therein, setting forth the right thereto, and describing

the tracts of land in which dower is claimed; and the court, on the hearing, shall render such judgment as to it appears just and consistent with the rights of all the parties interested therein. [86 v. 184; S. & S. 310.]

A proceeding by a widow for the assignment of dower is a civil action, and a judgment or final order therein may be appealed from, 43 O. S. 390; *contra*, 3 Bull 787. Grantee of deceased husband and those holding under him are not estopped to deny that their grantor had title, 3 O. S. 344. An answer simply denying right of petitioner to the dower claimed is insufficient, 10 O. S. 501.

§ 5709. Incumbrances may be presented by cross-petition. When the rights of a lessee or lien-holder are shown to the court, by cross-petition filed before judgment, such rights and liens shall be regarded by the court; and no inequality shall be allowed, or any injustice done, to any such lessee or lien-holder. [22 v. 135, § 10; S. & C. 520.]

When the vendor of a tract of land having a lien for the purchase money, obtains a judgment upon which the land is sold for a sum sufficient to pay the whole amount, the lien does not pass to the purchaser of the land so as to enable him to set it up against the widow's estate of dower, but is extinguished by the sale on execution, 1 O. 99.

§ 5710. Proceedings when land lies in different counties. When the lands lie in several counties the petition may be filed in any county wherein a part of the estate is situated, and the common pleas court of such county shall have complete jurisdiction, and may order the whole dower of such widow or widower to be assigned in any one or more of such counties, and out of any one or more of such tracts of land, if the same may be done without prejudice to the rights of any person claiming title to or holding a lien on such land. [86 v. 184.]

§ 5711. Proceedings in case of death before assignment. When the plaintiff dies before the assignment of dower, or before entry of the final judgment, the action may be revived in the name of the executor or administrator (1); the court shall proceed to hear and determine, if not before decided, whether the plaintiff would have been entitled to dower in such action; if it be found that the plaintiff would have been so entitled, the court shall adjudge in favor of such executor or administrator a sum equal to one-third of the rental value of the real estate in which it is found the plaintiff would have been entitled to dower, from the time of filing the petition until death, after deducting one-third

of the necessary expenses; and the sum so adjudged in favor of such executor or administrator shall be a lien upon the real estate in which such plaintiff would have been entitled to dower, and its payment may be enforced by sale as upon execution. [86 v. 184.]

1. 2 Bull 76. Formerly the right ceased with her death, 14 O. 20; see 44 O. S. 645, 661.

§ 5712. **Appointment of commissioners to assign dower.** When dower is adjudged, the court shall appoint three judicious, disinterested men of the county in which the action is pending, who are not of kin to either of the parties interested, to be commissioners, and issue its order to the sheriff of that county, commanding him that, by the oaths of the commissioners, which may be administered by him, he cause to be set off and assigned such dower to the plaintiff, in the manner set forth in the judgment. [54 v. 27, § 12; 38 v. 37, § 1; S. & C. 521, 522.]

The value is to be estimated as of the time of assignment, including improvements made by the heir, 10 O. 498; excluding improvements made by purchasers, 6 O. 76; 8 O. 418; 4 W. L. J. 540; fees of commissioners, see § 1300.

§ 5713. **Proceedings upon return of assignment of dower.** The commissioners and sheriff shall in all things obey the order, and return their proceedings thereon to the court at such time as the court appoints; if the court approve the assignment, it shall be entered on the records thereof, and shall be thenceforth valid and effective in law; and execution shall thereupon be issued, directing the sheriff of the county to put the widow or widower in full possession of the dower assigned. [86 v. 185; S. & C. 521.]

§ 5714. **Assignment of dower when estate indivisible.** When an estate of which a widow or widower is dowable is entire, and no division thereof can be made by metes and bounds, dower shall be assigned as of a third part of the rents, issues, and profits thereof, to be computed and ascertained by the commissioners. [86 v. 185; 29 v. 249, § 14; S. & C. 521.]

§ 5714a. **Proceedings when estate consists of timber or other unimproved lands.** When an estate of which a widow or widower is dowable, or in which a widow or widower owns a dower or curtesy interest heretofore assigned to or vested in her or him, consists, in whole or part, of timber lands or other unimproved lands or lots, commissioners, appointed as hereinbefore provided, shall return to the court a true appraisement

of such lands in money, and also a true appraisement of the annual rental value thereof, and if it shall appear to the court, upon the hearing of such report, that the assignment of dower or curtesy in such lands, either by metes and bounds or as of the rents, issues and profits, can not be or has not been made so as to provide such widow or widower with an income from the lands or lots so charged, commensurate with the value of the same, as fixed and determined by said commissioners, the court shall determine the value of such dower or curtesy in money, and make an order directing the sheriff to advertise and sell the lands, so charged with dower or curtesy, or so much thereof as may be necessary, as upon execution; provided, said sheriff shall not be required to cause such lands to be appraised, but the value thereof as returned by said commissioners shall be taken as the appraised value thereof, and such lands shall not be sold for less than two-thirds of such appraised value; upon the confirmation of such sale the court shall order the payment to such widow or widower out of the moneys arising from such sale, the value of such dower or curtesy so fixed and determined; provided, further, the person or persons owning such lands or lots so charged, may at the time the order for the sale of said lands is made as aforesaid, elect to pay to such widow or widower the value of said dower or curtesy, and if such payment be made within ten days or such further reasonable time as the court may grant, not exceeding ninety days from such election, the court shall make a decree divesting such widow or widower of any interest by way of dower or curtesy in said lands, and any widow or widower owning a dower or curtesy interest in timber lands or other unimproved lots or lands heretofore assigned to or vested in him or her, may maintain an action for relief in accordance with this section. [92 v. 314.]

§ 5715. **Dower during pendency of action.** The commissioners shall, after they have set off and assigned dower, make a just and true appraisement of the yearly value, after deducting necessary expenses, of the real estate in which the widow or widower is entitled to dower, estimating such value from the day of filing the petition to the day of assignment of dower, and make return of such appraisement and assignment, and the court shall adjudge the payment of one-third of the whole sum so returned, to the widow or widower out of

the real estate not covered by the dower, upon which judgment execution may issue; but nothing herein contained shall be so construed as to require execution to be issued against such of the defendants in dower as are minors; but in all such cases the dower shall operate as a lien upon the real estate, for their proportion of the judgment, until the same is fully paid. [86 v. 185; 41 v. 6, § 1; S. & C. 522.]

Rents, issues, and profits should be estimated as of the time the action is brought, 1 D. 527; commissioners re-appointed, Id. Assignment subject to deduction for taxes and repairs, but not for water rents or insurance, 25 O. S. 557.

Where a petition for an assignment of dower is filed, and afterward, before a decree is entered, the property is divided between the defendants, the dower may be charged on the whole lot, 1 D. 527.

§ 5716. Certain improvements to be excluded in estimating yearly value. The commissioners, in making the appraisement of the yearly value of the real estate provided for in the last section, shall exclude all permanent or valuable improvements made thereon after the deceased consort of such widow or widower ceased to be the owner thereof. [86 v. 185; 41 v. 6, § 2; S. & C. 522.]

§ 5717. Minor heir not to be prejudiced by collusive assignment of dower. If, during the minority of an heir, dower be assigned to a widow or widower not entitled thereto, or if the same was recovered by the default, fraud, or collusion of the guardian, such heir may, on coming of age, have an action against such widow or widower to recover the lands wrongfully awarded. [86 v. 185.]

§ 5718. Costs. If resistance be made to the petition of a person claiming dower, and the court find that such person is entitled to dower as claimed in the petition, the defendant so resisting shall be required to pay all costs of the suit; but if no resistance be made, the plaintiff shall pay one-third of the costs, and the legal owner of the real estate shall pay two-thirds thereof. [86 v. 185.]

§ 5719. Election of widow or widower to be endowed out of proceeds of sale. In actions for partition, when the estate can not be divided and is ordered to be sold, and in actions for the sale of real estate by executors, administrators, guardians and assignees, acting under a general assignment for the benefit of creditors, and in all other actions and proceedings

wherein the court may order the sale of real estate to satisfy any judgment or decree, the widow or widower of any decedent, who has a dower interest therein, being a party, may file an answer, and waive the assignment of dower by metes and bounds, and ask to have the same sold free of dower, and to have allowed, in lieu thereof, such sum of money out of the proceeds of the sale as the court deems the just and reasonable value of the dower interest therein. [91 v. 35.]

If she receives her dower from the proceeds of the sale, she is estopped to claim dower in the land sold, 22 O. S. 333. Court will protect widow's interest in default for answer, 1 O. S. 298. Vendor's lien superior to dower, 32 O. S. 210. See Assignee, 31 O. S. 158 (1877).

§ 5720. **Election by answer a release of dower to purchaser.** The answer of the widow or widower shall have the same force and effect, and shall be taken and held to be, in all respects, as a deed of release to the purchaser of such estate of the dower interest therein of such widow or widower. [86 v. 186.]

§ 5721. **Guardian of insane person may elect for.** The guardian of a widow or widower who has been adjudged insane may appear and answer for such Insane person in such action, subject to the approval of the court in which the action is pending; and the answer of the guardian shall have the same force and effect as if the widow or widower answered personally; but the guardian shall be liable to the widow or widower, or the heirs, for all damage or loss sustained by his fraud or collusion, notwithstanding the approval of the court. [86 v. 186.]

§ 5722. **Petition to discharge land of dower of insane person.** A person owning real property in this state, incumbered by the contingent or vested right of dower of an insane person, may apply, by petition, to the court of common pleas of the county in which the real estate, or any part thereof is situate, making defendants thereto such insane person, and also the husband or wife and guardian, if such person has either or both, for leave to sell all or any part thereof, discharged and unincumbered of such contingent or vested right of dower, which petition shall set forth the insanity of the person, together with a description of the land proposed to be sold; the court shall thereupon appoint a committee of six competent men, of whom at least three are physicians, who shall, under oath, inquire into the fact of the

insanity of such person, and shall hear testimony to be produced by the husband, wife or guardian, or, if there is no such guardian, by a guardian *ad litem*, to be appointed by the court in the action; and the committee shall, at any term of such court, make a report in writing of the result of their investigation, signed by the members thereof. [86 v. 186.]

§ 5723. Appraisement when person found insane. If the committee report unanimously that such person, in their opinion, is permanently insane, the court shall appoint three judicious freeholders to appraise the real estate described in the petition, whether the same is in one or several counties, who shall report in writing the value of each tract. [86 v. 186.]

§ 5724. *Id.* Proceedings on report of value to court. Upon the filing of such report the court may direct such petitioner to convey, by good and sufficient deed of conveyance, to the insane person, to be held by such person in fee, such proportion of the real estate described in the petition as shall to the court seem just and proper, or the court may assign to such insane person, to be held by such person during life, after the death of the husband or wife of such insane person, such proportion of the real estate described in the petition as shall to the court seem just and proper, for the support of such insane person, or the court may order the petitioner to invest an amount, to be by it fixed, in the stock of a company, or stocks created by the laws of this state, as by the court may be designated, the profits and dividends arising from such investment to be applied to the support and maintenance of the insane person after the death of the husband or wife of such insane person; and the petitioner may, upon his compliance with the order of the court, sell all the real property the petitioner is possessed of, described in the petition, free and unincumbered of the contingent or vested right of dower of such insane person. [86 v. 186.]

§ 5725. How dower of insane person barred. When the husband or wife of an insane person conveys any real estate in this state, in which such insane person has a contingent or vested right of dower, by virtue of such ownership of the husband or wife or otherwise, and the insane person does not join the husband or wife in such

conveyance, the husband or wife may apply by petition to the court of common pleas of the county in which the insane husband or wife resides, or, if the insane husband or wife resides out of the state, then in the county in which the real estate is situate, for leave to have any part or all of such real estate so conveyed released of the dower right therein, which petition shall set forth the insanity of the husband or wife, and a description of the land proposed to be affected; to which petition the insane person, the guardian, if there is one, and all persons in interest, shall be made defendants, and the petition shall be proceeded in, in all respects, in the manner prescribed in the three preceding sections, except that instead of ordering the petitioner to sell the real estate, or to convey or assign to such insane person any part thereof, the court shall direct the petitioner to make such investment as is provided in the preceding sections, or may require the petitioner to secure the amount to the use of the insane person by mortgage of unincumbered real estate of at least double the value thereof; and upon compliance by the petitioner with the order of the court, the court shall enter a judgment releasing and discharging the real estate from the incumbrance of such contingent or vested right of dower, and shall adjudge the holder of the legal title, or other party liable, to pay to the petitioner any sum withheld or retained as indemnity against such dower right. [61 v. 99, § 1; S. & S. 440; 86 v. 187.]

§ 5725a. Real estate may be conveyed free from dower if husband or wife insane. That any real estate or interest therein, coming to any person by purchase after the husband or wife of such person is adjudged insane, and is an actual inmate of any asylum for the insane provided by the state may be conveyed by such person, at any time while such insane husband or wife remains an inmate of any such asylum, free and clear, from any dower, right or expectancy of such insane person, and dower shall not attach to any such real estate both so acquired and conveyed during said time as aforesaid in favor of such insane person, and the indorsement upon the instrument of conveyance, by the superintendent of any such asylum that such husband or wife is an insane inmate of such asylum

stating when received therein, signed officially by him, shall be sufficient evidence of the fact that such husband or wife is such insane inmate and such indorsement shall be a part of such instrument of conveyance. [87 v. 281.]

CHAPTER VIII.

HABEAS CORPUS.

§ 5726. Who entitled to the writ. A person unlawfully restrained of his liberty, or a person entitled to the custody of another, of which custody he is unlawfully deprived, may prosecute a writ of *habeas corpus*, to inquire into the cause of such imprisonment, restraint, or deprivation. [29 v. 164, § 1; S. & C. 681.]

The state courts have jurisdiction in all cases of imprisonment, 6 O. S. 55. The jurisdiction extends to cases of void commitments, 2 C. S. C. R. 71; to inquiries as to cause of detention in the house of refuge, 19 O. S. 184; but not to inquiries into the title of an officer, 21 O. S. 610. The writ can not be used as a summary process to review or revise errors or irregularities in the sentence of a court of competent jurisdiction. If the sentence is not void absolutely, a petition in error is the appropriate remedy, 7 O. S. 81; 22 O. S. 442; 1 D. 10; 25 O. S. 426; 2 C. C. R. 168. A petition in error is the appropriate remedy to reverse an order discharging a prisoner, 6 O. S. 55, and the remedy where a prisoner is convicted of a criminal offense, and erroneously sentenced to excessive imprisonment therefor by a court of competent jurisdiction, 25 O. S. 426, 432. Discharge of prisoner by this writ based on the pardon of the governor is not impeachable for fraud in obtaining it, 39 O. S. 377. When common pleas court has decreed the custody of children to one of the parties on rendering a decree for divorce a probate court can not interfere as to the custody by *habeas corpus* or letters of guardianship, 15 O. S. 427. When district court may, 9 Bull 271. Custody of infant child awarded to mother, 25 Bull 327.

§ 5727. Who may grant it. The writ of *habeas corpus* may be granted by the supreme court, the circuit court, the common pleas court, the probate court, or by a judge of either. [82 v. 36; 29 v. 164, § 1; 51 v. 167, § 3; S. & C. 681, 1213.]

The supreme court will act only in exceptional cases, 25 O. S. 440.

§ 5728. Requisites of application therefor. Application for the writ shall be by petition, signed and verified either by the party for whose relief it is intended, or by some person for him, and shall specify:

1. That the person in whose behalf the application is made is imprisoned, or restrained of his liberty.

2. The office, or name, of the person by whom he is confined or restrained; or, if both are unknown or uncertain, he may be described by an assumed appellation; and the person who is served with the writ shall be deemed the person intended.

3. The place where he is so imprisoned or restrained, if known.

4. A copy of the commitment or cause of detention of such person shall be exhibited, if it can be procured without impairing the efficiency of the remedy; or, if the imprisonment or detention is without any legal authority, such fact shall appear. [29 v. 164, § 1; 45 v. 45, §§ 4, 5; S. & C. 681, 684-5.]

In cases other than those of controverted custody, the allegation of unlawful "restraint of liberty," or words of precisely the same import, is essential in the application to give the court jurisdiction. The defect is not cured by amendment, nor waived by appearance of respondent and a trial. 11 Bull 186.

§ 5729. When the writ will not be allowed. If it appear that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed; or, if the jurisdiction appear after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order. [29 v. 164, § 1; 32 v. 23; S. & C. 681, 684.]

See § 5728, notes. If it appear that the court issuing the process had jurisdiction to do so, the writ ought not to be allowed even if there be informality or defect in the proper judgment or order, 2 C. C. 163. If the court had jurisdiction to render the judgment and issue the process, the fact that the mittimus does not properly describe the offense, or allege that the act was *willfully* done will not authorize the court to discharge the relator, 3 C. C. 10. Employees of a corporation arrested for contempt of court for the violation of an order against the corporation, where the court has no jurisdiction to make the order, may be released on *habeas corpus*, 5 C. C. 207. In a proceeding in *habeas corpus* evidence may be given to prove the want of jurisdiction in the court to make the order. *Id.* See 8 C. C. 324.

§ 5730. When the writ must be granted. A court or judge authorized to grant the writ must, when a petition therefor is presented, if it appear that the writ ought to issue, grant the same forthwith. [29 v. 164, § 1; S. & C. 681.]

§ 5731. **Who to issue the writ, and when.** The writ, upon its allowance, shall be issued forthwith, by the clerk of the court whereof the person who granted it is a judge, under the seal of such court; or, in case of emergency, such judge may issue the writ under his own hand, and may depute any officer or person to serve it. [29 v. 164, § 1; S. & C. 681.]

§ 5732. **How prisoner may be designated.** The person to be produced shall be designated by his name, if known, and if not known, or uncertain, he may be described in any other way so as to make known who is intended. [45 v. 45, § 5; S. & C. 685.]

§ 5733. **Requisites of writ in certain cases.** In case of confinement, imprisonment, or detention by an officer, the writ shall be directed to him, and shall command him to have the body of such person before the court or judge designated in the writ, at a time and place therein specified. [45 v. 45, § 1; S. & C. 684.]

§ 5734. **Form of writ when prisoner not in custody of an officer.** In case of confinement, imprisonment, or detention by a person not an officer, the writ shall be in the form following:

THE STATE OF OHIO, _____ COUNTY, SS.

To the sheriff of our several counties, greeting:

We command you that the body of _____, of _____, by _____, of _____, imprisoned and restrained of his liberty, as it is said, you take and have before _____, a judge of our _____ court, or, in case of his absence or disability, before some other judge of the same court, at _____, forthwith to do and receive what our said judge shall then and there consider _____ concerning him in his behalf; and summon the said _____ then and there to appear before our said judge, to show the cause of the taking and detention of the said _____.

[SEAL.] Witness _____, at _____, this _____ day of _____, in the year _____.

[45 v. 45, § 1; S. & C. 684.]

§ 5735. **How and where writ may be served.** The writ may be served in any county, by the sheriff of the same or any other county, or by a person deputed by the court or judge. [45 v. 45, § 2; S. & C. 684.]

§ 5736. **How executed and returned.** The officer or person to whom the writ is directed shall convey the person so imprisoned or detained, and named in the writ, before the judge allowing the writ, or, in case of

his absence or disability, before some other judge of the same court, on the day specified in the writ; and he shall make due return of the writ, together with the day and cause of the caption and detention of such person, according to the command thereof. [29 v. 164, § 2; S. & C. 682.]

Refusal to make return is a contempt, 1 W. L. J. 168. *Mandamus* is the remedy when officer refuses to take prisoner before commissioner of insolvents, 19 O. S. 581.

§ 5737. When it may be returned to another judge or court. When the writ is issued by a court in session, if the court has adjourned when the same is returned, it shall be returned before any judge of the same court; and when the writ is returned before one judge, at a time when the court is in session, he may adjourn the case into the court, there to be heard and determined. [45 v. 45, § 3; S. & C. 684.]

§ 5738. What shall be stated in the return of the writ. When the person to be produced is imprisoned or restrained by an officer, the person who makes the return shall state therein, and in other cases the person in whose custody the prisoner is found shall state, in writing, to the court or judge before whom the writ is returnable, plainly and unequivocally:

1. Whether he has, or has not, the party in his custody or power, or under restraint.

2. If he has the party in his custody or power, or under restraint, he shall set forth, at large, the authority, and the true and whole cause, of such imprisonment and restraint, with a copy of the writ, warrant, or other process, if any, upon which the party is detained.

3. If he has had the party in his custody or power, or under restraint, and has transferred such custody or restraint to another, he shall state, particularly, to whom, at what time, for what cause, and by what authority, such transfer was made. [45 v. 45, § 6.]

In *habeas corpus* the petition and return, if they raise a material issue of fact are such pleadings that that issue may be determined in that action, 3 C. C. 263. A return by the respondent that she has not had the custody or control of the body sought, thereby denying the allegations of the petition, raises such an issue, *Id.* The hearing in such case is not defeated by the fact that the person whose body is sought to be obtained is not found by the sheriff, *Id.*

§ 5739. The return must be signed and sworn to. The return or statement shall be signed by the person who makes it; and it shall also be sworn to by him, unless he is a sworn public officer, and makes the return in his official capacity. [45 v. 45, § 7; S. & C. 685.]

§ 5740. Adjournment of cause. The court or judge to whom the writ is returned, or the court into which it is adjourned, may, for good cause shown, continue the cause, and shall make such order for the safe-keeping of the person imprisoned or detained as the nature of the case requires. [45 v. 45, § 9; S. & C. 685.]

§ 5741. When prisoner must be discharged. When the judge has examined into the cause of caption and detention of the person so brought before him, and is satisfied that he is unlawfully imprisoned or detained, he shall forthwith discharge him from confinement. On such examination the judge may disregard matters of form or technicalities in any mittimus or order of commitment by a court or officer, authorized to commit by law. [78 v. 113; 29 v. 164, § 3.] 3 C. C. R. 10.

§ 5742. When prisoner may be committed or let to bail. When the person is confined or detained in a legal manner, on a charge of having committed a crime or offense which is bailable, the judge shall, at his discretion, recommit him, or let him to bail; if he be let to bail, the judge shall cause him to enter into a recognizance, with sufficient surety, in such sum as he deems reasonable, the circumstances of the prisoner, and the nature of the offense charged, considered, conditioned for his appearance at the court where the offense is properly cognizable; the judge shall certify his proceedings, together with the recognizance, forthwith, to the proper court; and if the person charged fail to enter into such recognizance, he shall be committed to prison by the judge. [29 v. 164, § 3; S. & C. 682.]

§ 5743. When prisoner must be committed. If it appear that the prisoner was committed by a judge or justice, and is plainly and specifically charged in the warrant of commitment with a felony the punishment whereof is capital, he shall not be removed, discharged, or bailed. [29 v. 164, § 8; S. & C. 683.]

§ 5744. When the return is evidence, and when only a plea. If it appear that the prisoner is in custody under

a warrant or commitment in pursuance of law, the return shall be considered *prima facie* evidence of the cause of detention; but if he is restrained of his liberty by any alleged private authority, the return of the writ shall be considered only as a plea of the facts therein set forth, and the party claiming the custody shall be held to make proof of such facts; and upon the final disposition of any case, the court or judge shall make such order as to costs as the case requires. [45 v. 45, § 8.]

3 C. C. R. 263; 39 O. S. 378; 42 O. S. 111.

§ 5745. **Penalty upon clerk for refusal to issue the writ.** If a clerk of a court refuse to issue the writ, after allowance thereof, and demand therefor, he shall forfeit to the party aggrieved the sum of five hundred dollars. [29 v. 164, § 5; S. & C. 682.]

§ 5746. **Penalty for disobeying the writ.** A person to whom a writ is directed, who neglects or refuses to obey or make return of the same according to the command thereof, or makes a false return thereof, or who, upon demand made by the prisoner, or any person on his behalf, refuses to deliver to the person demanding, within six hours after the demand therefor, a true copy of the warrant of commitment and detainer of the prisoner, shall, for the first offense, forfeit to the party aggrieved two hundred dollars, and for the second offense four hundred dollars, and, if an officer, shall be incapable of holding his office. [29 v. 164, § 4; S. & C. 682.]

§ 5747. **Persons enlarged upon the writ not to be again imprisoned.** A person who is set at large upon a writ shall not be again imprisoned for the same offense, unless by the legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause or offense; and a person who knowingly, contrary to the provisions of this chapter, recommitts or imprisons, or causes to be recommitted or imprisoned, for the same offense, or pretended offense, any person so set at large, or knowingly aids or assists therein, shall forfeit to the party aggrieved five hundred dollars, notwithstanding any colorable pretense or variation in the warrant or commitment. [29 v. 164, § 6; S. & C. 682.]

§ 5748. **Prisoner not to be removed from custody of**

one officer to another, unless, etc. A person committed to prison, or in custody of an officer, for any criminal matter, shall not be removed therefrom into the custody of another officer, unless by legal process, or the prisoner be delivered to an inferior officer to carry to jail, or, by order of the proper court, be removed from one place to another within the state for trial, or in case of fire, infection, or other necessity; and a person who, after such commitment, makes, signs, or countersigns any warrant for such removal contrary to this section, shall forfeit to the party aggrieved five hundred dollars. [29 v. 164, § 7; S. & S. 683.]

§ 5749. No person to be sent out of the state for crime committed in the state. No person shall be sent prisoner to any place out of this state for any crime or offense committed within this state. [65 v. 165, § 9; S. & S. 387.]

§ 5750. A person so transported may have an action. A person so imprisoned may maintain an action for false imprisonment, against the person by whom he was so imprisoned or transported, and against a person who contrives, writes, signs, seals, or countersigns any writing for such imprisonment or transportation, or aids or assists in the same, or against any of them. [65 v. 165, § 9; S. & S. 387.]

§ 5751. Record of writs. Error, etc. The proceedings upon a writ of *habeas corpus* shall be recorded by the clerks respectively, and may be reviewed on error as in other cases. [45 v. 45, § 10; S. & C. 685.]

52 O. S. 260.

§ 5752. Action for penalties. Limitation. The penalties in this chapter provided may be recovered by the party aggrieved, his executors or administrators, against the offender, his executors or administrators, by civil action in any court having cognizance of the same; but no action shall be brought for any offense against the provisions of this chapter after two years after the offense is committed, except in cases of imprisonment of the party aggrieved, when action may be brought within two years after his delivery out of prison, or after his decease, if he die in prison. [29 v. 164, § 10; S. & C. 683.]

§ 5753. Fees and costs. The fees of officers and witnesses shall be taxed by the judge, on his return of his

proceedings on the writ, and shall be collected as part of the original costs in the case, and when the prisoner is discharged the costs shall be taxed to the state, and paid out of the county treasury, upon the warrant of the county auditor; but no officer or person shall have the right to demand payment in advance of any fees which he is entitled to by virtue of the proceedings, when the writ is demanded or issued for the discharge from custody of a person confined under color of proceedings in any criminal case; when a person in custody by virtue or under color of proceedings in any civil case is discharged, costs shall be taxed against the party at whose instance he was so in custody; and if he be remanded to custody, costs shall be taxed against him. [45 v. 45, § 11; S. & C. 685.]

CHAPTER IX.

PARTITION.

§ 5754. Who may be compelled to partition. Tenants in common, and coparceners, of any estate in lands, tenements, or hereditaments within the state, may be compelled to make or suffer partition thereof in manner hereinafter prescribed. [29 v. 254, § 1; S. & C. 893.]

Title. A right of entry without actual seizin will entitle a party to partition, 2 O. S. 207. In a statutory proceeding for partition a legal title in the demandant is necessary, 16 O. S. 443; 2 O. S. 336; 14 O. 502. If his title is equitable merely, the proceeding should be under the code for an equitable partition, and the defendant should be brought into court by process, 16 O. S. 443. No partition was allowed when the title was in controversy, 14 O. 502; 7 Bull 267. A mistake in the title, however, might be corrected, 9 O. 170, but the title itself may be tried when the proceeding is under the code, 33 O. S. 128; and an answer denying plaintiff's title does not oust the court of jurisdiction, 27 O. S. 110; 41 Id. 81, but a statutory partition operates only on the possession, and does not create any new title, 15 O. S. 337; 2 O. S. 207; and when parties to a proceeding for partition are made such by publication and without actual notice, they are not estopped thereby from setting up their legal title, 15 O. S. 337. While a proceeding in partition does not create a new title, but merely dissolves the tenancy in common, yet if in amicable partition quit claim deeds are made to a parcener and her husband instead of to her alone, he takes by purchase, 45 O. S. 152, 168. The rule that no new title is created by partition proceedings does not apply to deliberate conveyances between the parties to effect amicable partition, especially where there is an independent consideration for such conveyances. Therefore where a husband and wife, tenants in common, partition the land by mutual deeds through a trustee for a valuable consideration the rights of the wife in her land are to be determined by the law as it was at the date of the conveyances, 39 O. S. 516, 525. Improvements by co-tenants, taxes, 34 Bull 119.

Who may partition. Neither reversioners, 10 Rec. 491, nor remaindermen, 9 O. 74, are entitled to partition, but the owner of a life estate, who also owns an interest in remainder, may have partition, 11 O. 389; 2 O. S. 207; 1 C. C. R. 38; see 16 O. S. 218; and the existence of an ordinary lease for years under which the tenant is in possession, paying rent to the owners of the fee, is no obstacle to partition among such owners, 16 Bull 354. Owners of a railroad can not have partition, 33 O. S. 614, nor withdrawing members of the society of Separatists, 13 O. S. 144; nor shareholders in land syndicate, 29 Bull 403.

A civil action. Under the code the proceeding is a civil action, 33 O. S. 128; 36 O. S. 125; 41 O. S. 81, and appealable, 29 O. S. 440; 31 O. S. 53; 33 Id. 128. It was appealable under the act of 1852, 3 O. S. 366, but not under the act of 1858, unless equitable relief was sought, 15 O. S. 460; 21 O. S. 527; nor in 1842 under

the statute, 11 O. 254. It is queried whether all actions for partition are not now appealable, 2 Yaple's Fr. etc., 835, and now so held, 49 O. S. 374; 6 C. C. 477, 554; 7 C. C. 338. U. S. courts, 33 Bull 56.

Miscellaneous. The regularity of proceedings in partition can not be inquired into in a collateral proceeding, 10 O. 250; 14 O. 228. The fact that two actions for partition were prosecuted at the same time does not vitiate the regular proceedings in the one upon which the partition is made, 7 O. (Pt. 2) 118. Purchaser from a tenant in common can not throw the owner of title upon later purchasers, 9 O. 126. Partition of land held in common will bind the owner of an interest, although other persons may have represented his right in the partition proceedings, 9 O. 170. When separate interests have been acquired under an erroneous partition, chancery will exercise jurisdiction to bring all parties before the court, 13 O. 544. Tenant by curtesy who is a party to a partition proceeding, and who fails to set up his interest is estopped after the sale as against the purchaser to claim such interest, 41 O. S. 303. Rights of an administrator of an intestate whose estate is sought to be partitioned, 38 O. S. 46, of purchasers at partition sale of property partitioned by the heirs of one supposed to be dead, 38 O. S. 233. Of judgment creditors and mortgagees, 10 Bull 230. The statute concerning the partition of legal estates did not afford the remedy to which the parties were entitled and partition was enforced by a civil action under the code, 36 O. S. 125. Partnership real estate not subject to partition, 19 Bull 139. After decree of sale against one parcener, decree made to operate on his divided part, 8 Bull 267. Dedication of streets laid out in, 3 C. C. 313. Plaintiff, though trustee of an interest in premises may acquire valid title by purchase at sale in partition, 6 C. C. 554. Notice to non-residents — parol evidence to show, *Id.* Parol partition, when binding, 27 Bull 195; 33 *Id.* 68. Wife dowerable only in portion assigned to husband in partition, *Id.* Parties — interests of tenants in common separate, 7 C. C. 364.

§ 5755. Where proceedings for partition may be had.

When the estate is situate in one county, the proceedings shall be had in that county; and when situated in two or more counties, the proceedings may be had in any county wherein a part of such estate is situate. [29 v. 254, § 1; S. & C. 893.]

See §§ 5022, 5023.

§ 5756. *Petition for partition.* A person entitled to partition of an estate may file his petition therefor in the court of common pleas, setting forth the nature of his title, and a pertinent description of the lands, tenements, or hereditaments of which partition is demanded, and naming each tenant in common, coparcener, or other person interested therein, as defendants; provided, however, that where the title to such estate came to such person by descent or devise upon the death of an inhabitant of this state, a partition thereof shall

not be ordered by the court within one year from the date of the death of such inhabitant, unless the petition shall set forth and it be proved that all of the debts and claims against the estate of such decedent have been paid, or secured to be paid, or that the personal property of said deceased is sufficient to pay the same. [88 v. 151; 29 v. 254, § 2; S. & C. 895.]

The plaintiff must allege in his petition the title and interests of the several tenants, and sustain the same by proof, 14 O. 502. Owners of distinct parcels can not be joined, 7 O. (Pt. 2) 129. A husband is competent to make partition of the wife's real estate, but the right he acquires by the proceeding does not extinguish her right, which survives to her or her heirs, 9 O. 121. Non-joinder of the husband in partition of the wife's land does not affect his curtesy, 9 O. 118. Misnomer—"Pillsby" for "Pillsbury"—not material, *Id.* Service by publication sufficient, *Id.* All persons interested must be made parties, 4 C. C. 315. The statute does not require the petition to allege that the plaintiff has a legal title to any part of the land of which partition is sought, 6 C. C. 477; 16 O. S. 443. Under 88 v. 151; 7 C. C. 338; 9 *Id.* 91; 31 Bull 153.

§ 5757. **The order of partition.** If the court find that the plaintiff has a legal right to any part of such estate, it shall order partition thereof in favor of the plaintiff, or all parties in interest, appoint three disinterested and judicious freeholders of the vicinity, to be commissioners to make the partition, and order a writ of partition to issue. [29 v. 254, § 2; 74 v. 152; S. & C. 895.]

Deputy sheriff may act as one of commissioners, 7 O. (Pt. 2) 118 (1836). Fees of commissioners, § 1300. Verification of pleadings by each party, his agent or attorney, 25 Bull 78.

§ 5758. **The writ of partition.** The writ of partition may be directed to the sheriff of either of the counties in which any part of the estate lies, and shall command him that, by the oaths of the commissioners, which oath may be administered by him, he cause to be set off and divided to the plaintiff, or each party in interest, such part and proportion of the estate as the court shall order. [38 v. 37; 74 v. 152, § 4; S. & C. 900.]

§ 5759. **Duties of commissioners.** In making such partition the commissioners must view and examine the estate, and, on their oaths, set apart the same in such lots as will be most advantageous and equitable, having due regard to the improvements, situation, and quality of the different parts thereof. [29 v. 254, § 5; S. & C. 896.]

Action of majority of commissioners binding, though the name of one is improperly erased from report, 1 C. C. R. 47. Advancements in money can not be considered, 18 O. 519.

§ 5760. Commissioners' duty when more than one tract to be partitioned. When partition of more than one tract is demanded, the commissioners shall set off to each plaintiff or party in interest his proper proportion in each of the several tracts, unless the several tracts are owned by the same proprietors in the same proportion in each tract, in which case the whole share of any proprietor, in all the several tracts, may be set off to such proprietor according to the best discretion of the commissioners. [29 v. 254, § 6; S. & C. 896.]

The ruling in 7 O. (Pt. 2) 118, that in making partition among several tenants in common of several tracts of land, owning in the same proportion, it is regular to assign to any one an entire tract, was reversed by 13 O. 551.

§ 5761. Amicable partition. Before a writ of partition is issued, the person of whom partition is demanded, may appear in court in person, or by attorney, and consent to a partition of the estate agreeably to the prayer and facts set forth in the petition, which amicable partition when made and recorded shall be valid and binding between the parties thereto, and in such cases, where the lands are divided by the commissioners among the parties, the court shall on motion of any party in interest order the sheriff to execute and deliver to each person entitled thereto a deed for the portion set off and assigned to such person. [78 v. 258; 29 v. 254, § 7; S. & C. 897.]

§ 5762. Commissioners to appraise land when they can not divide it. Election to take. When the commissioners are of opinion that the estate can not be divided according to the demand of the writ without manifest injury to the value thereof, they shall return that fact to the court, with a just valuation of the estate (1); whereupon, if the court approve of the return, and one or more of the parties elect to take the estate at such appraised value, the same shall be adjudged to him or them, upon his or their paying to the other parties their proportion of the appraised value thereof, according to their respective rights, or securing the same as herein-after provided (2). [65 v. 71, § 8; S. & S. 505.]

1. It is not necessary or regular to insert this provision in the entry of the order for partition, 11 Bull 275. 2. Election by husband gives him no right in the reversion dependent on his estate of curtesy, 8 O. 87. Where a party having no title was made

a party to the proceeding and elected to take the land, the deed gave him a good title, but he was held accountable for all the purchase money, 7 O. S. 417. Possession taken under the report, improvements being made will not, after the lapse of years, be disturbed, though no entry of confirmation of the report was made by the court, 5 O. 243. Where one had been absent and unheard of for nearly thirty years, and his estate was partitioned and sold, after which he returned, the purchaser was held to have acquired no title in the land, as against him, but was held entitled to be compensated for improvements, 36 O. S. 232. The "balance" of the land includes the reversion in the dower, 39 O. S. 96.

§ 5763. Terms of payment and deed where party takes the estate. If one or more of the parties elect to take the estate at the appraised value, the terms of payment, unless the court, on good cause shown, by special order, direct and require the entire payment to be made in cash, or unless all the parties in interest agree thereon, shall be one-third cash, one-third in one year, and one-third in two years, with interest, the deferred payments to be secured to the satisfaction of the court; and on payment being made in full, or in part, with sufficient security for the remainder, as above provided, the sheriff shall, according to the order of the court, make and execute a conveyance to the party electing to take the same. [65 v. 71, § 8; S. & S. 505.]

Inchoate right of dower is divested by the sale, 6 O. S. 547, but not by partition; and the court will enforce contribution to compensate the party from whom it is taken, 15 O. S. 355.

§ 5764. Sale of estate when parties do not elect to take it. If no such election to take the estate be made, the court may, at the instance of a party, make an order for the sale thereof at public auction, by the sheriff who executed the writ of partition, or his successor in office. [29 v. 254, § 9; S. & C. 897.]

Sale may be made on executor's cross-petition, 38 O. S. 46, and proceeds paid to him, 10 Rec. 566.

§ 5765. How sale conducted, and terms thereof. All such sales shall be made at the door of the court-house, unless the court, for good cause, direct the same to be made on the premises, and shall be conducted in all other respects as a sale upon execution, except that it shall not be necessary to appraise the estate; but the estate shall not be sold for less than two-thirds of the appraised value thereof, as returned by the commissioners; and unless the court, by special order, direct and require, on good cause shown, the entire payment to be

made in cash, the purchase money shall be payable one-third on the day of sale, one-third in one year, and one-third in two years thereafter, with interest. [29 v. 254, § 9; 45 v. 49; 49 v. 102; S. & C. 897, 900, 901.]

Rents, unless reserved, pass by the sale, 26 O. S. 629; but crops do not, 10 O. S. 124. Appraisers might purchase prior to act of 1841, 14 O. 228.

§ 5766. Confirmation of sale. Execution of deed. On the return by the sheriff of his proceedings, the court shall examine the same; if sale has been made, and the court approve such sale, the sheriff, on receiving payment of the consideration money, or taking sufficient security therefor, to the satisfaction of the court, shall execute and deliver a deed to the purchaser. [29 v. 254, § 10; S. & C. 897.]

A misrecital in the date of the deed may be corrected, 6 O. 255. The sheriff may acknowledge it after the expiration of his office, 8 O. 87. It has been held insufficient without seal, 5 O. S. 307. Judgment lien after sale does not affect the title, 8 O. S. 646; 22 Id. 615; 31 Id. 175. The remedy of the judgment creditor is against the co-tenant's interest in the proceeds of the sale, 8 O. S. 646. Sheriff could make the sale, and confirmation was not necessary, under the act of 1820, 8 O. 415.

§ 5767. Distribution of proceeds. Sheriff's liability. The money or securities arising from a sale of or an election to take the estate, shall be distributed and paid, by order of the court, to the parties (1) entitled thereto, in lieu of their respective parts and proportions of the estate according to their just rights therein; and all receipts of such money or securities by the sheriff shall be in his official capacity, and his sureties on his official bond shall be liable for any misapplication thereof (2). [65 v. 71, § 8; 29 v. 254, § 10; S. & C. 897; S. & S. 505.]

1. The securities must be made payable to the parties, and payment to the sheriff is insufficient, 21 O. S. 402; 30 O. S. 299. 2. 16 O. S. 382; 30 Id. 299. Payment to attorney who procured the partition sale, and who was not specially authorized to receive the money, does not exonerate ex-sheriff, 39 O. S. 610. A failure of the sheriff to return or pay over the purchase money or securities by him received does not affect the title of the purchaser, 16 O. S. 389. The sureties on his official bond for the second term are not liable for default in not paying over money received during first term, 31 O. S. 378. Generally, 4 C. 315; 25 Bull 78.

§ 5768. Proceedings when estate has been once offered and not sold. When the estate has been once offered and not sold, an alias writ for the sale thereof may issue as often as need be; and the court may order a revaluation, by three judicious and disinterested free-

holders of the vicinity, to be appointed by the court, and direct a sale of the estate at not less than two-thirds of such revaluation, or, if the court deem it for the interest of the parties, it may order a sale without such revaluation, at not less than such sum as it may fix. [29 v. 254, § 11; S. & C. 898.]

§ 5769. When successor of sheriff to make deed to purchaser. When a conveyance of land sold, or elected to be taken, is not made by the officer who made the sale, the court, being first satisfied that such sale or election was regularly made, and that the purchase money has been fully paid or secured, may, on motion, order the sheriff of the county, or officer performing the duties of sheriff, to execute and deliver to the purchaser, or person electing to take the property, a deed for the lands so sold or elected to be taken. [56 v. 152, § 1; S. & C. 899.]

§ 5770. When widow is entitled to dower, or there is a life estate. When a widow is entitled to dower in an estate of which partition is sought, dower must be assigned her therein, except in the following cases :

1. When an assignment thereof has already been made.
2. When she has, by answer, elected to be endowed out of the proceeds of a sale of the estate, and the commissioners do not make partition, but return a valuation of the estate.
3. When the right of dower extends only to an undivided interest in the estate.

In the latter case, and in cases where an undivided interest is subject to a life estate, and the tenant for life has not, by answer, elected to receive the value of his estate out of the proceeds of a sale of the interest, the commissioners may, if an appraisement of the estate is to be returned, assign the dower, or set off the life estate, or, if they find it for the interest of the parties so to do, they may appraise the whole interest, and the widow and the tenant for life shall receive the value of their interests out of the proceeds of a sale thereof. [29 v. 254, § 12; S. & C. 898.]

Dower is charged on all shares, 1 D. 527; it may be assigned in the proceeds of sale or by assessment on the shares, 25 O. S. 270. Where the commissioners reported the assignment of dower by metes and bounds, and that partition of the "balance" could not be made without manifest injury thereto, and appraised the value "thereof" in money, it was held it would be presumed the word "balance" referred to the estate of the parties in the

entire tract of land, including the part assigned to the widow as her dower, 39 O. S. 95. Where the husband was absent sixteen years, the wife was held entitled to year's support from the purchase money, 41 O. S. 436. Where dower was assigned by an annuity charge on the lands, and the court having ordered that the parties pay the installments as they became due, and in default, that execution should issue, it was held that the order was void for uncertainty, and that the remedy of the doweress was by action to enforce the lien on the land, 25 O. S. 270. When the testator left to his wife by will all his real estate, and then certain sums of money to his brothers and nephews, but made no further disposition of his real estate, the widow elected not to take under the will. Some of the heirs, a nephew and a niece, petitioned for partition; the widow demurred, and the demurrer was sustained, 16 O. S. 218.

§ 5771. Commissioners appointed to partition estate to assign dower. The commissioners appointed by the court to make partition shall set off to such widow her dower in the estate; and in the performance of such duty they shall be governed in all respects by, and the proceedings shall conform to, the provisions prescribing the duties of commissioners in assigning dower, in chapter seven of this division. [29 v. 254, § 13; S. & C. 898.]

§ 5772. Power of guardian to act for ward. The guardian of a minor, idiot, imbecile, or insane person may, on behalf of his ward, do and perform any act, matter or thing, respecting the partition of an estate which such minor, idiot, imbecile, or insane person, could do under this chapter, if he were of age and of sound mind; and he may elect on behalf of such ward to take the estate when the same can not be divided without injury, and make payment therefor on behalf of such ward. [83 v. 83; 29 v. 254, § 14; 48 v. 38, § 1; S. & C. 899, 901.]

Guardian to be made party, 1 Clev. R. 157; can act for infant, 5 O. S. 307; 8 O. 415; may act *ex parte* for all under act 1820, 8 O. 415.

§ 5773. Powers of foreign guardian. A person appointed according to the laws of any other state or country, to take charge of the estate of an idiot or insane person not a resident of this state, may, upon being duly authorized in this state to take charge of such estate situated in this state, act in the partition of such estate to the same extent that the guardian of an idiot or insane person is authorized to do by the last section. [48 v. 38, § 2; S. & C. 901.]

§ 5774. Actions for rents and profits by tenants in

common. Waste. One tenant in common, or coparcener, may recover from another his share of rents and profits received by such tenant in common or coparcener from the estate, according to the justice and equity of the case; and one parcener may maintain an action of waste against another; but no parcener shall have or possess any privileges over another, in any election, division, partition, or matter, to be made or done, concerning lands which have descended. [65 v. 187; 29 v. 254, § 15.]

Liable for using estate to pasture cattle; not liable for interest without demand before suit, 46 O. S. 66. Tenants in common of real estate may contract with each other for the exclusive right to the use and occupancy of the same. Those acquiring such right by renting from others are liable to an action for rent due upon such contract, 42 O. S. 190. Married women, tenants in common, may unite in an action to recover rent due, *Id.* Appeal will lie from the common pleas to the circuit court in an action by one co-tenant against another for rents and profits, 38 O. S. 467.

§ 5775. **Partition of property belonging to religious corporations.** When two or more religious denominations, or other societies or associations, have united in a corporation, and as such corporation acquire title to real estate in this state, and subsequently agree to separate and form two or more separate corporations under the laws of the state, either corporation, after such separate organization, may file its petition, under this chapter, for partition of such property so required and held. [62 v. 142; S. & S. 506.]

§ 5776. **Partition of property belonging to religious societies.** When two or more religious societies or congregations have, by gift or purchase, acquired land upon which to erect a house of public worship, and other buildings for church or school purposes, and for a cemetery, in common, and either of such societies or congregations desires to abandon the joint use of such house of public worship, or other erections, it may commence an action for the partition of the use of such common property, except the cemetery, which may continue to be used in common. [56 v. 67, § 1; S. & C. 371.]

§ 5777. *Id.* When made, and effect thereof. If the court find that partition, in cases mentioned in the last section, can be made in such manner as to occasion no

confusion or inconvenience to either party in the separate use of the common property, it may order partition thereof to be made; it shall specify in the judgment for what purpose partition of the use is made, and how and for what purpose the use of the premises allotted to each party shall be occupied; and in no case shall the same or any part thereof be occupied for any other purpose than the erection of a house of worship, and other erections connected therewith. [56 v. 67, §§ 2, 3, 4; S. & C. 371.]

§ 5778. **Costs and expenses to be equitably taxed.** The court, having regard to the interest of the parties, and the benefit each may derive from a partition, and according to equity, shall tax the costs and expenses which accrue in the action, including reasonable counsel fees, which shall be paid to plaintiff's counsel (1), unless the court award some part thereof to other counsel for service in the case for the common benefit of all the parties; and execution may issue therefor as in other cases. [29 v. 254, § 16; S. & C. 899.]

1. 21 O. S. 657.

CHAPTER X.

REAL ACTIONS.

SUBDIVISION I. TO QUIET TITLE AND RECOVER POSSESSION.

§ 5779. **Action to quiet title.** An action may be brought by a person in possession, by himself or tenant, of real property, against any person who claims an estate, or interest therein, adverse to him, for the purpose of determining such adverse estate or interest; or such action may be brought by a person out of possession, having or claiming to have an estate or interest in remainder or reversion in real property, against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interests of the parties therein. [90 v. 226; 67 v. 116.]

Actual possession must be averred and shown, *Yaple's Pr. etc.*, 773; 8 O. 382. The statute has since been changed. Formerly, both title and possession, under acts 1824, 1831; 1 D. 65; 2 O. S. 540; 5 O. 194. The claim or interest must be adverse to the *title* of the party in possession, but it is not necessary that the adverse claim should relate to or affect the right of present possession, 34 O. S. 420. Before the amendment, 67 v.

116, it was held that the action did not lie against a party claiming prospectively under a contingent remainder, 19 O. S. 468. In 34 O. S. the court distinguished this case by saying that in it defendants did not claim an interest or estate in the land, *Id.* 425. The action lies to settle questions of disputed boundary lines, 35 O. S. 597; 17 O. S. 72, 76; to determine the validity of a ditch assessment, 30 O. S. 590; to reform a deed and quiet possession, 40 O. S. 41. It may be brought by a grantor after sale and before conveyance, 2 O. S. 540; by lessor acquiring tax title against lessee, 8 Rec. 556; by purchaser from grantee of state against holder of certificate of purchase guilty of laches, 42 O. S. 410; by grantee of mortgagee with consent and by verbal agreement with mortgagor, 18 O. S. 273. It does not lie for a trespass, 34 O. S. 492, unless the acts are repeated and there are threats to persist, 35 O. S. 597; nor by purchaser from vendee, unless purchase money is tendered, 5 O. S. 211; nor to avoid a judgment obtained without legal service where plaintiff was not guilty of misconduct and defendant had actual knowledge of the pendency of the action, 37 O. S. 502; nor by an heir, not in possession, to annul the will, 31 O. S. 295; nor can it be sustained with respect to personality where no title is established at law, and it is not necessary to prevent multiplicity of suits, 4 O. S. 77. It will not be retained to adjust disputed questions of title between defendants in respect to land in which plaintiff has no interest, 29 O. S. 642. Where recovery of possession is not sought, there is no right to a jury trial, 17 O. S. 72. On dismissal of bill the court may quiet the title of defendants and restore possession to them, 35 O. S. 567. Where land is sold by one who owns only an undivided part, but heirs who own the rest acquiesce for a long time and receive their shares of the purchase money, the title can be quieted against them, 2 O. S. 251. A judgment creditor may file a bill to clear away the cloud cast upon the title by sale under foreclosure and subject the land again to sale, or he may charge the fund arising from such sale in satisfaction of his judgment, 16 O. 449. Where sale is made to defraud creditors, they may have title quieted as to grantee, 8 O. 382. Naked possession sufficient, 5 C. C. 347. Petition, 8 C. C. 614.

2 5780. Vendee may recoup amount of liens and incumbrances. In actions for the recovery of purchase money of real estate, by vendor against vendee, it shall be competent for such vendee, notwithstanding his continued possession, to set up, by way of counter-claim, any breach of the covenants of title acquired by him from the plaintiff, and to make any person claiming an adverse estate or interest therein party to the action; and upon the hearing he shall be entitled to recoup, against the plaintiff's demand, the present worth of any existing lien or incumbrance thereon; and if the adverse estate or interest of the claimant is an estate in reversion or remainder, or contingent upon a future event, the court may order the vendee, with his assent, to surrender the possession to his vendor, upon the repayment of so much

of the purchase money as has been paid thereon, with interest, or direct the payment of the purchase money claimed in the action, upon the plaintiff giving bond in double the amount thereof, with two or more sureties, to be approved by the court, for the payment of the same, with interest, if the defendant or his privies be subsequently evicted by reason of the defect. [67 v. 116, § 557.]

The provisions of this act are remedial, and affect all causes of action arising after its passage, 24 O. S. 554; see *Id.* 542. A third person holding an outstanding title must be made defendant, and the validity of his title established before the defense becomes available, 28 O. S. 39. The right to bring in such third party exists only where there has been a breach of the covenants in the deed, 35 O. S. 289. The vendee may recoup the damages he has sustained by reason of false representations although the vendor believed them to be true and had good reason for so believing, 39 O. S. 491. Right of vendor to proceed against the land in the hands of a *bona fide* purchaser from the vendee by a conveyance defectively executed, 37 O. S. 66, 67. See § 5072*nn*; 2 C. C. 198.

§ 5781. Action to recover possession of real estate.
Petition. In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same as required by § 5095, and that the defendant unlawfully keeps him out of the possession; and it shall not be necessary to state how the plaintiff's estate or ownership is derived. [51 v. 57, § 558; S. & C. 1119.]

See § 5060, notes—Ownership or title. Plaintiff may recover for any interest he may prove a title to less than the claim in the devise, 6 O. 391. One tenant in common may sue alone, 6 O. 392, may sue co-tenant, 2 O. 110. Trustees of religious society can maintain, 13 O. 129; 12 O. S. 248, and owner of land forfeited to state, 16 O. 519, and tenant by the curtesy, 32 O. S. 184, and reversioner for forfeiture, 5 O. 28. Owner under whom defendant occupies should be made party, otherwise he is not bound, 24 O. S. 416. Can not unite with others having no title, 7 O. (pt. 2) 136. Where land has been unlawfully appropriated by a corporation, owner may elect to proceed under § 6448 *et seq.*, or in ejectment, 35 O. S. 540. An amendment can not be made after the statute of limitations has run as to land omitted so as to include such land, as if described in original petition, 46 O. S. 373.

§ 5782. Id. Answer. It shall be sufficient, in such action, if the defendant in his answer deny generally the title alleged in the petition, or that he withholds the possession; but if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted, and

when he does not defend for the whole premises, the answer shall describe the particular part for which defense is made, and the defendant may further set forth in his answer such other and further grounds of defense, counter-claim and set-off, as he has or might have in any other form of action, whether they are such as have heretofore been denominated legal or equitable, or both. [80 v. 66; 51 v. 57, § 559; S. & C. 1122.]

See § 5006, Ejectment; § 5070, p. 103. In an answer denying title, a plea of the statute of limitations, 29 O. S. 359; 35 O. S. 387, and a denial that defendant wrongfully keeps plaintiff out of possession, 37 O. S. 147, is surplusage. An equitable defense must be specially pleaded, 36 O. S. 357. Illegality of consideration was, before the last amendment, held no defense in an action of ejectment upon a mortgage, 7 O. (Pt. 2) 70; 37 O. S. 383. Defendant relying solely on his legal title, and failing, is not estopped to maintain an action to correct mistakes in the deeds under which the parties to the action claimed. He may elect to rely on such equitable title as a defense or counter-claim, or maintain an action thereon, 39 O. S. 141. An order sustaining a demurrer to a cross-petition on the ground that facts stated were not sufficient to constitute a defense to the action will not preclude the court after verdict for plaintiff from treating the cross-petition as properly in the case for the purpose of awarding defendant compensation for lasting and valuable improvements, 35 O. S. 18. A general verdict for plaintiff is sufficiently definite and responsive in ejectment, where the answer was a general denial, 3 Bull 555. Failure to aver that defendant unlawfully keeps plaintiff out of possession, when not fatal, 7 C. C. 393.

§ 5783. Petition in action by tenant in common against co-tenant. In an action by a tenant in common of real property against a co-tenant, the plaintiff must state, in addition to what is required in § 5781, that the defendant either denied the plaintiff's right, or did some act amounting to such denial. [51 v. 57, § 560; S. & C. 1122.]

§ 5784. The recovery when right terminates during the action. In an action for the recovery of real property, when the plaintiff shows a right to recover at the time the action was commenced, but his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover for withholding the property. [51 v. 57, § 561; S. & C. 1122.]

§ 5785. Parties may have benefit of occupying-claimant law. Parties in an action for the recovery of real property may avail themselves, if entitled thereto, of the

benefit of the statutes for the relief of occupying claimants of land. [51 v. 57, § 564; S. & C. 1122.]

SUBDIVISION II. OCCUPYING CLAIMANTS.

§ 5786. In what cases occupying claimants to be paid for improvements. A person in the quiet possession of lands or tenements, and claiming to own the same, who has obtained title to and is in possession of the same without fraud or collusion on his part, shall not be evicted or turned out of possession by any person who sets up and proves an adverse and better title, until the occupying claimant, or his heirs, are fully paid the value of all lasting and valuable improvements made on the land by him, or by the person under whom he holds, previous to receiving actual notice by the commencement of suit on such adverse claim, whereby such eviction may be effected, unless such occupying claimant refuse to pay to the person so setting up and proving an adverse and better title the value of the land, without improvements made thereon as aforesaid, upon demand of the successful claimant, or his heirs, as hereinafter provided, when:

1. Such occupying claimant holds a plain and connected title, in law or equity, derived from the records of a public office; or,

2. Holds the same by deed, devise, descent, contract, bond, or agreement, from and under a person claiming title as aforesaid, derived from the records of a public office, or by deed duly authenticated and recorded; or,

3. Under sale on execution, against a person claiming title as aforesaid, derived from the records of a public office, or by deed duly authenticated and recorded; or,

4. Under a sale for taxes authorized by the laws of this state, or the laws of the territory northwest of the river Ohio; or,

5. Under a sale and conveyance made by executors, administrators, or guardians, or by any other person or persons, in pursuance of an order of court, or decree in chancery, where lands are or have been directed to be sold. [29 v. 261, § 1; S. & C. 881.]

Notice of title before improvement is a bar, 5 W. L. J. 465; but an occupying claimant is not presumed to know any defects or recitals that appear in deeds prior to the deed of his grantor; and if a recital in that or his own deed shows that the premises once belonged to a third person, it will not defeat the occupant's

claim to the benefit of the statute, 1 O. S. 118. And the mere fact that the occupant had notice of the claim which is successfully asserted is not conclusive evidence of fraud and collusion on the part of such purchaser, but he may show, notwithstanding such notice, that he purchased in actual good faith and made his improvements in the honest belief that the land was his own, 11 O. S. 339. To entitle a party to relief, he must be evicted by a title both paramount and adverse. Eviction by a trustee holding the legal title is not sufficient, 35 O. S. 18; but the facts may be such as to entitle such evicted purchaser on cross-petition to compensation in equity for permanent improvements made upon the premises, to be charged as a lien upon the land, Id.: see 3 O. 827. The party evicted must make his claim for the benefits of the law in the action by which he is evicted, otherwise he waives it, 40 O. S. 343. The benefits of the law do not extend to an assignee of land warrant, 7 O. (Pt. 2) 200; to the heir of a purchaser under a fraudulent conveyance, 13 O. S. 263; to one in possession under a mortgagor, but without deed from him, W. 886; see 3 O. 327; to a mortgagee of a tenant in common who took under a will providing for survivorship, 22 O. S. 255. Act of 1849 giving option to defendant unconstitutional, 3 O. S. 463. There must be a vested interest or fee in the party asserting title, 30 Bull 38.

1. A township trustee's office is a "public office" within the meaning of the law, 6 O. 538.

2. A "deed duly authenticated and recorded" means a deed to the person under whom the occupant claims, and not a deed to the occupant, 1 O. S. 118 (overruling 19 O. 57); 13 O. 308. A deed from purchaser's heir sufficient, 1 C. S. C. R. 83.

3. 5 O. 398.

4. See 7 O. (Pt. 1) 17; 8 O. 539.

5. A purchaser at judicial sale is entitled to the benefits of the law, 5 O. 898; 6 O. 9, and a purchaser from judgment debtor after judicial sale and before confirmation, 4 Bull 441; 2 Clev. R. 201, but not a purchaser from judgment debtor after levy, 7 O. (Pt. 2) 188.

§ 5787. Tax title gives right to benefits of occupying-claimant law. The title by which the successful claimant succeeds against the occupying claimant, in all cases of lands sold for taxes by virtue of any law of this state, or the laws of the territory northwest of the river Ohio, shall be considered an adverse and better title, under the provisions of the last section, whether it be the title under which the taxes were due, and for which the land was sold, or any other title or claim; and the occupying claimant holding possession of land so sold for taxes, having the deed of a collector of taxes or county auditor therefor, or a certificate of such sale from a collector of taxes or a county treasurer, or claiming under the person who holds such deed or certificate, shall be considered as having sufficient title to the land to demand the

value of improvements under the provisions of the last section. [29 v. 261, § 2; S. & C. 883.]

§ 5788. Entry of claim against occupying claimant.

The court rendering judgment against the occupying claimant, in any case provided for by this subdivision, shall, at the request of either party, cause a journal entry thereof to be made; and the cause shall then proceed as in other civil cases. [87 v. 237; 29 v. 261, § 3, S. & C. 883.].

This is a separate proceeding, in which the prevailing party is entitled to costs, though he be the party ejected, 1 O. 156.

§ 5789. Duties of jury. For the trial of the question of fact remaining undisposed of, a jury shall be impaneled and sworn as in other civil cases, and shall at once proceed to view the premises in question, and after viewing the same, shall return to the court house and then and there, in open court, the trial shall proceed as in other civil cases, and the rights of the parties shall be determined by the jury after hearing the testimony of the witnesses, which may be produced by either party, under the direction of the court; and from said view and the testimony, the jury shall ascertain and shall find in their verdict the reasonable value of all permanent and valuable improvements made on the land previous to the occupying claimant receiving actual notice of the adverse claim of the plaintiff, and also the damages, if any, the land has sustained by waste, including the value of timber or other valuable material removed or destroyed, and the net annual value, rents and profits of the land accruing, after the occupying claimant received notice of the claim of plaintiff's title by service of summons; and the jury shall also find the value of the land at the time the judgment was rendered with the improvements thereon, and the value of the land without the improvements thereon, or damages sustained by waste, including removal or destruction of the timber or other valuable material, and shall return their verdict in open court as in other civil cases. [87 v. 237; 29 v. 261, § 4; S. & C. 883.]

The occupying claimant is entitled to recover as well for im-

provements made by his grantor as by himself, 2 O. 235; 13 O. 308; but not for improvements made outside of the land described in his title deeds, 15 O. 13. Improvements can not be set off against mesne profits, 8 O. 401.

§ 5790. Sheriff to summon talesmen. If any juror named in the order is absent from the county, of kin to either party, or from any other cause disqualified or unable to serve upon the jury, the sheriff may summon a talesman as in other cases, who shall be qualified and shall serve as if originally drawn and named in the order. [29 v. 261, § 5; S. & C. 884.]

§ 5791. Setting verdict aside. If either party be aggrieved by any such assessment or valuation, he may apply to the court at any time during the term at which the trial was had, by a motion to set aside the verdict, assessment, and valuation, and the court may, upon good cause shown, set aside such assessment, valuation and verdict, order a new valuation, and another jury to be drawn, which shall proceed in like manner, as hereinbefore directed; provided, that in all cases either party shall have the right to challenge jurors the same as in other civil actions; and provided further, that if more than three witnesses be examined by either party on the same point in the same case, the judge may tax the costs of such additional witnesses to the party calling them, and the provisions herein shall apply to all actions now pending as well as those hereafter to be brought. [87 v. 237, 238; 84 v. 45; 29 v. 261, § 6; S. & C. 884.]

§ 5792. Judgment and execution on verdict for plaintiff. If the jury report a sum in favor of the plaintiff in ejectment, on the assessment and valuation of the valuable and lasting improvements, the assessment of damages for waste, and the net annual value of the rents and profits, the court shall render a judgment therefor, without pleadings, and issue execution thereon as in other cases; or, if no such excess be reported, then, and in either case, the plaintiff in ejectment shall be thereby barred from having or maintaining an action for mesne profits. [29 v. 261, § 7; S. & C. 884.]

§ 5793. Proceedings when verdict is for occupying claimant. If the jury report a sum in favor of the occupying claimant, on the assessment and valuation of the

valuable and lasting improvements, deducting therefrom the damages, if any, sustained by waste, together with the net annual value of the rents and profits which the defendant has received after commencement of the action, the successful claimant, or his heirs, or, if they are minors, their guardians, may either demand of the occupying claimant the value of the land without the improvements so assessed, and tender a deed of the land to the occupying claimant, or may pay the occupying claimant the sum so allowed by the jury in his favor, within such reasonable time as the court shall allow. [29 v. 261, § 8; S. & C. 884.]

§ 5794. When writ of possession will issue. If the successful claimant, his heirs, or their guardians, elect to pay, and do pay, to the occupying claimant, the sum reported in his favor by the jury, within the time allowed by the court, then a writ of possession shall issue in favor of the successful claimant, his heirs, or their guardians. [29 v. 261, § 9; S. & C. 885.]

§ 5795. When claimant elects to receive value of the land. If the successful claimant, his heirs, or their guardians, elect to receive the value of the land without improvements, so assessed to be paid by the occupying claimant, and tender a general warranty deed of the land conveying such adverse or better title, within the time allowed by the court for the payment of the money, and the occupying claimant refuse or neglect to pay the same to the successful claimant, his heirs, or their guardians, within the time limited, a writ of possession shall be issued in favor of the successful claimant, his heirs, or their guardians. [29 v. 261, § 10; S. & C. 885.]

Successful claimant electing to convey must tender a warranty deed, 15 O. 285.

§ 5796. When occupant may have action for title. The occupying claimant, or his heirs, shall not be evicted from the possession of such land, except as is provided in the two preceding sections, where an application is made for the value of improvements; and in all cases where the occupying claimant, or his heirs, pay into court the value of the land, without improvements, within the time allowed by the court, when an election has been made by the successful claimant, his heirs, or

their guardians, to surrender land under the provisions of this subdivision, such occupant or his heirs may, at any time after such payment is made, bring an action in the court where judgment of eviction was obtained, and obtain judgment for the title of the land, if the same had not been previously conveyed to such occupant as aforesaid. [29 v. 261, § 11; S. & C. 885.]

SUBDIVISION III. TO COMPLETE REAL CONTRACTS.

§ 5797. When the survivors of vendors of land may be authorized to convey. When two or more persons who own an interest in land become bound in writing for the sale and conveyance thereof, and one of them dies before the land is conveyed, the survivor or survivors may, by petition against the purchaser, and the heirs or devisees of such deceased party, be authorized to complete such contract. [29 v. 258, § 1; S. & C. 259.]

§ 5798. Id. Petition. The petition must set forth the names of all the contracting parties, describe the lands contracted for, state the time the contract was made, that the contract has been fully performed by the purchaser, and have annexed a copy of the contract. [29 v. 258, § 3; S. & C. 260.]

§ 5799. Id. Judgment. Deed. If the court find the allegations of the petition to be true, it may make an order authorizing and empowering the survivors to complete the contract by conveying the land; and the deed shall recite the order, and shall convey as complete and perfect a title, and have the same effect, as if executed by all the owners. [29 v. 258, § 2; S. & C. 260.]

§ 5800. Action by executor, etc., to complete contract for sale of land. When a person who has entered into a written contract for the sale and conveyance of an interest in land dies before the completion thereof, and his executor, administrator, or other legal representative, desires to complete the contract, he may file a petition therefor in the court of common pleas or probate court of the county in which the land, or any part thereof, is situate; if the petition be filed in the probate court, service may be made therein as in civil actions; and the heirs at law, devisees, or other legal representatives of the deceased vendor, when not plaintiffs, must be made defendants in the action. [29 v. 258, § 5; S. & C. 260.]

Formerly proceedings to complete contract of married woman dying before execution of conveyance were void, 84 O. S. 589.

§ 5801. When court may order conveyance. Deed. The court, after causing to be secured to and for the benefit of the estate of the deceased its just part and proportion of the consideration of the contract, may authorize the executor, administrator, or other legal representative to complete the contract, and to execute a deed for and on behalf of the heirs at law to the purchaser, which shall recite the order, and be as binding on the heirs at law, and all other persons interested, as if it had been made by the deceased in his lifetime. [29 v. 258, §§ 6, 8; S. & C. 261.]

§ 5802. Heirs of deceased purchaser may enforce specific performance. The heirs at law, or devisees, of a person who purchased an interest in land by written contract, and died before conveyance thereof to him, may compel such conveyance as the deceased might have done. [29 v. 258, § 7; S. & C. 261.]

See §§ 5005, 5006, 5060, notes—Specific performance.

SUBDIVISION IV. TO SELL ENTAILED AND OTHER ESTATES.

§ 5803. Who may obtain a sale of entailed and certain other estates. Courts of common pleas, in an action by the tenant in tail or for life, or by the grantee or devisee of a qualified or conditional fee, or of any other qualified, conditional, or determinable interest, or by a person claiming under such tenant, grantee, or devisee, or by the trustees or beneficiaries, if the estate is held in trust, may authorize the sale of any estate, whether the same was created by will, deed, or contract, or came by descent, when satisfied that a sale thereof would be for the benefit of the person holding the first and present estate, interest, or use, and do no substantial injury to the heirs in tail, or others in expectancy, succession, reversion, or remainder; but this section shall not extend to estates in dower or by curtesy. [56 v. 154, § 1; 61 v. 80, §§ 1, 2; 62 v. 184, § 1; S. & C. 550; S. & S. 346, 347.]

Right of widow under will to relief under this statute though real estate devised, was all that testator was seized of at the time of his death, 4 C. C. 507.

These acts are constitutional as to estates created after their passage, 33 O. S. 213, 308, but not before 25 O. S. 283. The owner of a life estate in possession created by will subsequent to April

13, 1865, may institute proceedings for the sale of both the life estate and the estate in remainder, 33 O. S. 213. Generally, 8 C. C. 694.

§ 5804. Id. Requisites of petition. Parties. The petition shall contain a description of the estate to be sold, a clear statement of the interest of the plaintiff therein, and a copy (1) of the will, deed, or other instrument of writing by which the estate is created; all persons in being who are interested in the estate, or who may, by the terms of the will, deed, or other instrument creating the entailment or other estate, thereafter become interested therein as heir, reversioner, or otherwise, shall be made parties to the petition; and if the names of any persons who ought to be made parties are unknown to the plaintiff, or if the residence of any such party is unknown to the plaintiff, the fact shall be verified by the affidavit of the plaintiff, and the sale may be ordered notwithstanding such names and residences are unknown. [56 v. 154, § 2; S. & C. 550.]

1. Omission not ground of error when not objected to below, 33 O. S. 308.

§ 5805. Order for sale and effect of sale. If, upon the hearing of the petition, it may be made to appear to the court, by satisfactory proof, that a sale of the estate would be for the benefit of the tenant in tail or for life, and do no substantial injury to the heirs in tail, or others in expectancy, succession, reversion, or remainder, the court shall direct a sale of the estate to be made, and the manner thereof, and shall appoint some suitable person or persons to make the same; and such sale shall vest the estate sold in the purchaser, freed from the entailment, limitation, or condition. [56 v. 154, § 3; S. & C. 551.]

§ 5806. Sale may be had by consent. All parties in interest may appear voluntarily, and consent in writing to such sale; and testamentary guardians, and guardians appointed by the court of probate, may assent, in the place of their wards, to the sale. [56 v. 154, § 4; S. & C. 551.]

§ 5807. Report and confirmation of sale. Deed. All such sales shall be reported to the court authorizing the same; and if, on examination thereof, it appear that the sale was fairly conducted and made, and that the price obtained is the reasonable value of the estate sold, the

court shall confirm the sale, and direct a deed of conveyance of the premises sold to be made to the purchaser, on payment of the purchase money or on securing the payment thereof in such manner as shall be approved by the court. [56 v. 154, § 5; S. & C. 551.]

§ 5808. How proceeds of sale disposed of. All money arising from sales under this subdivision shall, for purposes of descent, succession, reversion, or remainder, have the same character, and be governed by the same principles, as the estate sold, and shall pass according to the terms of the deed, will, or other instrument creating the estate. [56 v. 154, § 6; 61 v. 80, § 1; S. & C. 551; S. & S. 346.]

§ 5809. How proceeds may be invested. Money arising from such sales shall, under the direction and approval of the court, be invested in the certificates of the funded debt of this state or of the United States, or in bonds secured by mortgage on unincumbered real estate situate in the proper county of double the value of the money secured thereby, exclusive of buildings and other improvements, and of timber, mines, and minerals; or the court may order the same to be re-invested in other real estate within this state, under such restrictions as it may prescribe, which investment shall be reported to the court, and subject to its approval and confirmation; the real estate in which the money is re-invested shall, for purposes of descent, succession, reversion, or remainder, have the same character, and be governed by the same principles, as the estate sold, and shall pass according to the terms of the deed, will, or other instrument creating the estate sold; the court shall appoint competent trustees to invest the money, and manage the same, who shall, from time to time, report to the court their proceedings, and the condition of the fund; and the court shall require of such trustees security for the faithful discharge of their duty; may, from time to time, require additional security; may remove such trustees for cause, or reasonable apprehension thereof; and may accept the resignation of a trustee, and fill a vacancy by a new appointment. [57 v. 25, § 7; S. & C. 551.]

§ 5809a. Sale—Investment of proceeds. Money arising from such sales, may, under the direction and approval of the court, be invested in bonds, which are either a portion, or the whole of an issue of bonds, secured by first mortgage or trust deed, upon the real

estate so sold, under such restrictions as said court may prescribe, which investment shall be reported to the court and be subject to its approval and confirmation. [92 v. 323.]

§ 5810. Who to receive income and pay taxes and expenses. The net income accruing from sales authorized by this subdivision shall be paid to the person or persons who would be entitled to the use or income of the estate were the same unsold; and all taxes, and the expenses of the investment and management of the fund, shall be paid by the person or persons entitled to the income thereof. [56 v. 154, § 8; S. & C. 551.]

§ 5811. Such estates may be leased. Upon like proceedings the court may direct that such estates be leased for a term of years, renewable or otherwise, as may appear most beneficial, and upon such terms as appear just and equitable; and the rents and profits shall be paid to the person or persons who might otherwise be entitled to the use and occupancy of the estate, or the income thereof. [56 v. 154, § 9; S. & C. 552.]

§ 5812. Sale of property given for religious use. When any real estate, except burial grounds or a cemetery, has been donated, bequeathed, or otherwise entrusted to, or purchased by, any person or trustee, for any public religious use, but not to or for the use of any specific or particular religious society or denomination, or when the same has been donated, bequeathed, or entrusted to, or purchased by, a particular religious society or denomination, and has been abandoned for such use, the court of common pleas of the county in which the same is located may, upon good cause shown, upon the petition of any citizen of the vicinity, make an order for the sale of such property, whether the same has been built upon or otherwise improved or not, and may make such order as to costs, and such disposition of the proceeds of the sale to such religious or other public use, as shall be just, proper, and equitable; and the purchaser thereof shall be invested with as full and complete a title thereto as the character of the original grant for such religious use will allow. [66 v. 126, §§ 1, 2.]

§ 5813. Necessary parties to the proceeding. All persons who have a vested, contingent, or reversionary interest in such real estate, and the trustees or other temporal officers of any religious society then using the same, shall be made parties to the petition, and be noti-

fied of the filing and pendency thereof, as in a civil action. [66 v. 126, § 2.]

Sales of church property by religious corporations, etc.; see §§ 3773-3776, 3787, 3888, 3794-3796, 5776, 5777 (Partition).

CHAPTER XI.

REPLEVIN.

§ 5814. When possession of personal property may be recovered. The possession of specific personal property may be recovered in an action as provided in this chapter. [51 v. 57, § 174; S. & C. 996.]

Pleading. Plaintiff must allege an interest in himself; a general ownership is sufficient, 26 O. S. 659; 11 C. C. 238; but need not aver right to possession, 35 Bull 76; unlawful detention on the part of the defendant, 35 Bull 76; 6 C. C. 269; and ask for an order of delivery, § 5816, and damages, § 5825. A plea of *non detinet* under the common law practice put both defendant's right of property and damages in issue, 12 O. 112. A general denial under the code puts in issue every material allegation of the petition, and defendant may give evidence of any special matter which amounts to a defense, 2 Bates Pl., etc., 909. Appeal will lie from justice irrespective of amount claimed or recovered, 12 O. S. 548; on appeal judgment on default for a petition may be rendered for defendant for a restoration of the property without an answer being filed, 30 Bull 19; but see 1 W. L. M. 598; 4 Bull 956. Sheriff, under a general denial, may make any defense he has, and under it prove his writ and levy on the goods in controversy, 11 Bull 225; see 45 O. S. 657; 19 Bull 245. Injunction to prevent defendant's disposal of property, 1 Bull 234.

The action lies for money if identifiable, 3 Bull 1122; 1 N. P. 353; for exempt property when levied on, 2 Clev. R. 129. It lies by a chattel mortgagee, 3 W. L. M. 306; against buyer at sale on execution against mortgagor, 8 Rec. 705; by mortgagee after condition broken, 26 O. S. 650, 663, but not before when the mortgagor is entitled to retain possession, 5 O. S. 93, unless by the terms of the mortgage the mortgagee may take the property if removed from the mortgagor, 19 O. S. 291. Mortgagor and mortgagee can not jointly sue, 6 Bull 247, nor owners of separate mortgages upon the same chattels, 15 Bull 125. The action lies by officer levying, against judgment debtor, 10 O. S. 488; against an officer levying on the wrong goods without demand, 13 O. 30; 12 O. S. 189; by vendor when goods are fraudulently purchased, 15 O. 200; 45 O. S. 657; when title does not pass until payment, 23 O. S. 1; 28 O. S. 630. It does not lie to recover losses by betting, W. 356; nor by finder against owner, 19 O. 29; nor for crops sown after judicial sale, 15 O. S. 351; nor before sufficient time has elapsed to allow of their delivery by tenant, 11 Bull 249. Property in a third person, defeats the action, 2 W. L. M. 155; but assignment for creditors after commencement of action but before service of order of delivery does not, 33 O. S. 523; and re-

plevin from carrier is no defense to consignee's action, 22 O. S. 597. The owner of a chattel sold by a bailee can recover the specific chattel or its value of whomsoever he may find in possession of it, 5 O. 202. Interpleader, §§ 5016, 5017. Joinder of actions, 1 C. S. C. R. 259; of parties, § 5014. Judgment limited to value of interest claimed in petition, 42 O. S. 1; 2 C. C. R. 95. Jurisdiction of federal courts, 2 D. 592. Possession by defendant necessary, 7 O. (Pt. 2) 133, may be by his agent, 33 O. S. 523; must exist at time of service, 14 O. S. 73. Substitution of plaintiff in execution for officer, § 5018. Title must be recognized at law, 2 W. L. M. 133; is acquired by plaintiff by execution of the writ, 14 O. S. 182; can not lawfully be replevied again, 10 Id. 461; only such as plaintiff claims recoverable, 42 O. S. 1; lies for wheat in warehouse, 46 O. S. 244. No bill of particulars required, 11 Bull. 145. *Res judicata*, 11 Bull. 190. Seller of goods conditionally may bring the action, 46 O. S. 450. The owner from whom goods have been purchased upon fraudulent representations may replevin them from one to whom the fraudulent vendee has transferred them in consideration of a pre-existing debt, 46 O. S. 355. Vendor of goods on credit who discovers that his vendee is insolvent, may replevy them *in transitu*, although they may have been attached by a creditor of the vendee, 12 O. S. 515. Verdict and judgment in replevin in another state finding right of possession in defendants, and that the property be returned to them is only *prima facie* evidence of property in the defendants and may be rebutted by showing exclusive property in one of them, 17 O. S. 183.

§ 5815. Affidavit for order of delivery. An order for the delivery of property to the plaintiff shall be issued by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his agent, or attorney, showing:

1. A description of the property claimed.
2. That the plaintiff is the owner of the property, or has an interest therein; and if the ownership or interest is special or partial, the facts shall be stated.
3. That the property is wrongfully detained by the defendant.
4. That it was not taken on process issued against the plaintiff and is not claimed by him under a title acquired mediately or immediately by transfer from one from whom such property had been taken by such execution, order or process, nor for a tax; or if taken on such process, that the property was exempt from execution expressly, or upon demand or selection by the plaintiff. [88 v. 273; 59 v. 25, § 175.]

Petition should be framed substantially as affidavit, 11 C. C. 238.

Affidavit may be amended, 1 W. L. M. 280. Two writs may issue on one affidavit, Id. 599. Affidavit to petition may be

sufficient as preliminary affidavit, 38 O. S. 657. The truth of the allegation that the property was not taken on process issued against defendant in replevin may be inquired into on motion, 25 Bull 10.

§ 5816. **Order for delivery.** The order for the delivery of the property to the plaintiff shall be addressed and delivered to the sheriff; and it shall contain the names of the parties, and the court in which the action is brought, and the sheriff shall be thereby commanded to take the property, deliver it to the plaintiff, and make return of the order on a day to be named therein. [51 v. 57, § 176; S. & C. 998.]

§ 5817. **When order returnable.** The return day of the order of delivery shall be the same as that of the summons. [51 v. 57, § 177; S. & C. 998.]

§ 5818. **How order executed.** The sheriff shall execute the order by taking the property therein mentioned; and he shall also deliver a copy of the order to the person charged with the unlawful detention of the property, or leave such copy at his usual place of residence. [51 v. 57, § 178; S. & C. 999.]

An order of delivery confers no authority on the officer executing it to seize property which is not actually or constructively in the possession of the party named in the process, 14 O. S. 73.

§ 5819. **Plaintiff to give undertakings.** The sheriff shall, except as provided in the next section, deliver the property so taken to the plaintiff, his agent or attorney, after the expiration of five days from the time the property is taken, when there is executed, by sufficient surety of the plaintiff, a written undertaking to the defendant in at least double the value of the property taken, to the effect that the plaintiff shall duly prosecute the action, and in case the judgment shall be against him, that he then return the property taken or pay the value so assessed, at the election of the defendant and also pay the damages assessed for the taking, detention and injury of the property and costs of suit; and the undertaking shall be returned with the order; provided, that the sheriff shall not be required to take possession of the property described in the order, un-

til there is executed by sufficient surety of the plaintiff a written undertaking to the defendant to the satisfaction of the sheriff to the effect that the plaintiff will duly prosecute the action, and also, that in the event that the suit shall be decided against the plaintiff, [that] the plaintiff will pay the costs made upon such order and the expenses incurred in the care and management of the property to be taken. [88 v. 273.]

The bond took the place of the property to the extent of the interest of the defendant in replevin, 10 O. S. 461; 42 O. S. 1. It was held good, though not signed by plaintiff, 1 W. L. M. 599, though signed by the party and one surety when the statute required two or more, 5 O. S. 256; though for less than double the value of the property, 1 W. L. M. 599; or the obligors were not freeholders, 1 H. 24. Justice liable for taking insufficient bond, 6 Bull 247. Obligor's liability is not avoided by showing his signature was procured by fraud of co-obligor, 5 O. S. 256. Sureties not released by substitution of defendants, 23 O. S. 622. Amendment of bond with obligor's consent, 1 Clev. R. 31. Plaintiff suing as administrator personally liable on bond, 4 O. 77. Where there has been no assignment of the bond nor refusal or neglect by the sheriff to enforce it an action thereon can only be maintained by the sheriff, 41 O. S. 591. Sureties liable for judgment recovered by sheriff against successor of assignee, *Id.* An indemnity bond taken by the sheriff in good faith from the plaintiff in replevin against loss by seizing goods which the bond recites are claimed by others than the defendant, is a valid obligation, as between the sheriff and the obligor, although no replevin bond was taken before delivering the goods to the plaintiff, 42 O. S. 508. *McIlvaine J.*, dissenting. But under the recent amendment (88 v. 273) the bond no longer vests title to the property. The amendment was not extended to cases pending at the time, and therefore does not apply to them. The question of value when controverted for the jury. The court can not take the question from the jury and instruct them to return a verdict for the amount found by the court, 7 C. C. 59; 30 Bull 19. See 7 C. C. 224. Under Justice's Code, 7 C. C. 303.

‡ 5820. **Duty of officer when property consists of heirlooms, etc.** When the property replevied consists of an heirloom, personal keepsake, or other article, the value of which consists in whole or in part of its being a relic, model, gift, family picture, painting, or rare production of art or nature, and not wholly in its general marketable character, the sheriff shall retain and safely keep the same, subject to the order of the court, if the defendant, his agent or attorney, within ten days after the same is replevied, serve a written notice upon the officer that he will demand the return of the same upon the final trial of the case, and that he will, at the next term of

the court, move for an order requiring the officer to retain the property, subject to the final order of the court; and if the defendant fail to give the notice aforesaid, or the court, upon application of either party, refuse to order the officer to retain the property, for the reason that it does not belong to one or more of the kinds of personal property aforesaid, the officer shall deliver the property to the plaintiff, his agent or attorney, upon the execution of an undertaking, as provided in the last section, to be filed with the clerk of the court within ten days from the expiration of the time to give the notice, or in case the notice is given within ten days after the refusal of the court to order the officer to retain the property. And provided further, that the defendant may at any time, within five days after the property is taken, execute an undertaking to the plaintiff, with one or more sufficient sureties in at least double the value of the property taken, conditioned that in case the judgment be against him, [that] he shall then return the property taken or pay the value so assessed, at the election of the plaintiff, and also pay the damages assessed for the taking, detention and injury of the property and costs of suit, whereupon said property shall be returned to the defendant by the officer, to be retained by the defendant until the determination of the action. Either plaintiff or defendant and their respective sureties, shall in any action on their respective undertakings, also be liable for a breach thereof, for the value of the other's interest in the property in question, and damages for its detention, including all profits, direct or indirect, which the defendant or plaintiff as the case may be, may have derived from or through such property; provided, further, that after the rendition of a judgment in any cause in which any undertaking has been given in compliance with the provisions of this chapter, upon motion to the court, the sureties upon the undertaking shall be notified to appear in such court, within ten days from the issuing of such service, and show cause why judgment should not be entered against them for the breach of such undertaking, whereupon such sureties shall be made parties defendant in such action, and

the same shall proceed as other civil actions. [88 v. 274.]

Redelivery bond evidence of identity of goods, 1 N. P. 48. Summary proceedings against sureties valid, 2 Id. 394. See 7 C. C. 224.

§ 5820a. Preservation of property ; sale in certain cases.

In all actions where the undertaking or undertakings shall have been given under § 5819, or under §§ 5819 and 5820, or under § 6616, when the action is pending on appeal or certified to the court of common pleas, the court, or a judge thereof in vacation, shall make proper orders for the preservation of the property and shall direct a sale of the property when, because of its perishable nature or of the cost of keeping it, a sale will be for the benefit of the parties; the sale shall be public after such advertisement as is prescribed for the sale of like property on execution, and shall be made in such manner and upon such terms of credit with security as the court or judge having due regard to the probable duration of the action may direct; and the sheriff shall hold and pay over all the proceeds of the sale collected by him, under the same requirements and responsibilities of himself and sureties as are provided in respect to money deposited in lieu of bail. The fund arising from such sale shall take the place of the property so sold, and upon such order for sale having been made the right of election provided for in said sections shall thereupon cease as to the property so sold. In all cases where such property shall have been held by the sheriff or other officer of the court, cost of keeping the same from the time it was taken until sold, shall be taxed as costs in the action. [89 v. 366.]

§ 5821. How value of property fixed. For the purpose of fixing the amount of the undertaking, the value of the property taken shall be ascertained by the oath of two or more responsible persons, whom the sheriff shall swear truly to assess the value thereof. [51 v. 57, § 180; S. & C. 999.]

§ 5822. Duty of officer with respect to property and liability. If the undertaking required by § 5819 be not given within twenty-four hours after the property is taken, or after the right first accrues to the plaintiff to receive the property from the officer on executing the proper undertaking, the officer shall return the property

to the defendant; and if the officer deliver any property so taken to the plaintiff, his agent or attorney, or keep the same from the defendant, without taking such security within the time and in the manner aforesaid, or if he take insufficient security, he shall be liable in damages. [67 v. 112, § 181.]

§ 5823. Qualifications of sureties. Exceptions to sufficiency. The defendant may, within ten days from the time the undertaking referred to in the last section is given by the plaintiff, give notice to the sheriff that he excepts to the sufficiency of the surety, and if he fail to do so, he shall be deemed to have waived all objections to them; when the defendant excepts, the surety must justify upon notice, as bail on arrest; the officer shall be responsible for the sufficiency of his surety until the objection thereto is waived, as above provided, or until they justify, and the property shall be delivered to the plaintiff when the undertaking required by § 5819 is given. [88 v. 275; 51 v. 57, § 182; S. & C. 999.]

§ 5824. Proceedings when plaintiff's action fails, etc. When judgment is rendered against the plaintiff on demurrer, or he fails to prosecute his action to final judgment, the court shall, on application of defendant, assess to defendant proper damages, including damages for the right of property or possession, or both, if he prove himself entitled thereto, or cause the same to be done by a jury, for which, with costs of suit, the court shall render judgment for the defendant. [65 v. 81, § 183; S. & S. 547.]

Finding of property and right of possession in defendant without pleading but merely upon default of plaintiff, does not preclude plaintiff on inquiry of damages, from showing he had in fact the property and right of possession, 4 Bull 956. If an issue of the right of property or possession, or both, is not tendered by the pleadings, the party can not prove the damages arising therefrom, 6 C. C. 271; see 30 Bull 19, § 5814nn.

§ 5825. Proceedings when jury finds for plaintiff, and on default. When the property is delivered to the plaintiff, or remains in the hands of the sheriff, as provided in § 5820, if the jury, upon issue joined, find for the plaintiff, and upon inquiry of damages upon a default, they shall assess adequate damages to the plaintiff for the illegal detention of the property, for which, with costs

of suit, the court shall render judgment for the plaintiff. [51 v. 57, § 185; 65 v. 81, § 184; S. & C. 1001; S. & S. 548.]

See § 6622; in actions before justices of the peace.

§ 5826. Proceedings when jury finds for defendant. When the property is delivered to the plaintiff, or remains in the hands of the sheriff, as provided in § 5820, if the jury, upon issue joined, find for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only (1), at the commencement of the suit; and if they find either in his favor, they shall assess to him such damages (2) as they think right and proper, for which, with costs of suit, the court shall render judgment for the defendant. [65 v. 81, § 184; S. & S. 548.]

1. 7 O. (Pt. 2) 232. A judgment without such finding is erroneous, 12 O. S. 432. Where issues are made upon inconsistent pleas, a general verdict for the defendant upon all is bad, 7 O. (Pt. 2) 232. Finding property in defendant is good, though property was in defendant and another, W 645. 2. W. 645. It is error to assess defendant's damages without the intervention of a jury, 12 O. S. 432; but in an action before a justice, if no jury is demanded, the justice may assess the damages, 26 O. S. 480. When property which he holds in execution is replevied from the sheriff, and the issue is found for the defendant, the measure of damages is the amount of the execution, with interest and costs if the value of the property exceeds it, and the value of the property if it is less than that amount, 17 O. 154. In replevin for several articles, when the jury find for the plaintiff as to part and for the defendant as to part, assessing to each the proper damages separate judgments should be entered for each, with full costs, 9 O. 72. When plaintiff alleges his ownership of the goods, his right to immediate possession thereof and their unlawful detention by the defendant, the latter may, under a general denial, prove that as an officer he levied upon the goods at the suit of a creditor of one from whom the plaintiff obtained them, and that the transfer to the latter was fraudulent and void as against creditors, 45 O. S. 657; see 9 Neb. 483; 6 C. C. 271. Judgment limited to value of interest claimed in petition, 2 C. C. 95. Conditional sale, when vendor may take possession under act, 82 v. 238; 46 O. S. 450.

§ 5827. When property not taken or returned, action may proceed as one for damages. When the property claimed is not taken, or is returned to the defendant by the sheriff for want of the undertaking required by § 5819, the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as are right and proper; but if the property be returned for want of the undertaking, the plaintiff shall pay all costs made by taking the same. [51 v. 57, § 186; S. & C. 1001.]

When the property has been returned the action may proceed, and plaintiff may recover to the extent of his interest in the property without any amendment of the pleadings, 10 O. S. 488.

§ 5828. Order for delivery may issue to different counties. An order for the delivery of the property claimed may be directed to any county; and several orders may issue at the same time, or successively, at the option of the plaintiff, but only one of them shall be taxed in the costs, unless otherwise ordered by the court. [51 v. 57, § 187; S. & C. 1001.]

§ 5829. When officer may break open building. The officer, in the execution of the order of delivery, may break open any building or inclosure in which the property claimed, or any part thereof, is concealed, but not until he has been refused an entrance into the building or inclosure, and the delivery of the property, after having demanded the same. [51 v. 57, § 188; S. & C. 1001.]

§ 5830. When action may be brought on the undertaking. No suit shall be instituted on the undertaking given under § 5819 until an execution issued on a judgment in favor of the defendant in the action has been returned unsatisfied. [51 v. 57, § 189; S. & C. 1001.]

§ 5831. When order may be set aside at clerk's cost. An order for the delivery of property issued under § 5815, without the affidavit required thereby, shall be set aside at the cost of the clerk who issued it, and such clerk, as well as the plaintiff, shall be liable in damages to the party injured. [51 v. 57, § 190; S. & C. 1001.]

See 25 Bull 10.

CHAPTER XII.

SURETIES—RIGHTS AND REMEDIES OF.

§ 5832. Certain sureties can not waive their rights. In contracts for the payment of money to banks or bankers, sureties in fact, known to the parties to be such at the time such contracts were made, may be proved, and shall be considered in all courts, to be sureties, and have all the privileges of sureties, anything in the contract expressed to the contrary notwithstanding. [43 v. 67.]

20 Bull 102.

§ 5833. Certain sureties may require creditors to sue. A person bound as surety in a written instrument for the payment of money, or other valuable thing, may, if a right of action accrue thereon, require his creditor, by notice in writing, to commence an action on such instrument forthwith, against the principal debtor; and unless the creditor commence such action within a reasonable time thereafter, and proceed with due diligence, in the ordinary course of law, to recover judgment against the principal debtor for the money or other valuable thing due thereby, and to make, by execution, the amount thereof, the creditor, or the assignee of such instrument, so failing to comply with the requisition of such surety, shall thereby forfeit the right which he would otherwise have to demand and receive of such surety the amount due thereon. [61 v. 19, § 1; S. & S. 741.]

The notice must be in writing, 41 O. S. 28, and pleaded, 7 O. (Pt. 1) 229. No particular forms of words are required. A substantial compliance with the statute is sufficient, 41 O. S. 28; 44 O. S. 430. A notice which is positive in its request to sue, and does not mislead the creditor as to the instrument to be sued on, is sufficient, *Id.* A notice, "You are hereby required at once to proceed and collect the note you hold upon which I am surety. . . . I will stand no longer," is sufficient, 40 O. S. 101. The notice must contain an unconditional requirement to commence the action forthwith. A notice that the surety "wishes" the creditor "to proceed against the principal debtor" and collect "the claim, or have it arranged in some way," and that the surety does "not wish to remain bail any longer," is not sufficient, 29 O. S. 663. The duty of the creditor to proceed within a reasonable time after such notice is imperative. It is the right of the surety to require that action be brought against the principal and diligently proceeded with; and this right is not affected by the fact of solvency or insolvency of such principal, 44 O. S. 430. Where the principal and surety are residents within the same jurisdiction, the duty of the creditor to commence an action, as required, is not affected by the fact that he is a real-

dent of another state, Id. To entitle the surety upon a note to the benefit of this section, it is not necessary that the fact of suretyship should appear upon the face of the note, Id. Under a similar statute it was held that when the surety gave notice to the creditor to sue, it was not a compliance with the statute to sue the surety alone, 2 O. 303. Requirement of notice, 35 Bull 114.

§ 5834. Representatives of sureties may have benefit of last section. The executor or administrator of a surety so bound may, in like manner, make such requisition of the creditor, or his executor or administrator, as provided in the preceding section; and in case of failure of the creditor, or his executor or administrator, to proceed as therein required, the executor or administrator, if he make the requisition, shall have the same relief as is therein provided for a surety. [61 v. 19, § 2; S. & S. 741.]

41 O. S. 28.

§ 5835. Limitation of the last two sections. Nothing in the last two sections contained shall be so construed as to affect bonds required by law to be given by guardians, executors, administrators, trustees of an express trust, public officers, or any bond or undertaking required by law to be given in an action or legal proceeding in any court of this state. [61 v. 19, §§ 3, 4; S. & S. 742.]

§ 5836. When surety subrogated and may revive judgment in his own name. When the surety in a judgment, who is certified therein to be such, or his personal representative, pays the judgment, or any part thereof, he shall, to the extent of such payment, have all the rights and remedies against the principal debtor that the plaintiff had at the time of such payment; and proceedings to revive the judgment shall be as provided in § 5367, and shall be in the name of such surety or representative, but the plaintiff in the original action shall not be liable for any costs therein. [78 v. 19; 68 v. 17, § 1.]

The section is constitutional, 36 O. S. 155. In the record of a judgment against three persons where it appeared that on motion, and by consent of parties the judgment is to stand against one as a surety only, it was held, that this was a sufficient certificate that he was such surety to authorize him to maintain an action to revive said judgment after it has become dormant, Id. The surety's right to revive is the same as the judgment creditor's, and is not barred until twenty-one years from the time the judgment became dormant, Id. 163. When a surety pays a judgment rendered against him and his principal he has the right, though not certified as such in the record of the judgment, to be subrogated to the place of the judgment creditor against the principal and all others standing in his shoes, 48 O. S. 75. This right

is not affected by the provisions of this section. The object of this section is to enlarge, not to limit, the rights the surety had for his indemnity against his principal, on payment of the debt, *Id.* Defendant may show his relation to judgment, 8 C. C. 70.

§ 5837. Sureties of county officers may apply to be discharged. A surety of a sheriff, auditor, probate judge, county treasurer, clerk of the court of common pleas, recorder and coroner, or infirmary director, may at any time notify the county commissioners by giving at least five days' written notice, that he is unwilling to continue as surety for such officer, and will, at a time to be therein named, make application to the commissioners to be released from further liability upon his bond; and he shall also give at least three days' written notice to such officer of the time and place at which such application will be made. [88 v. 264; 62 v. 69, § 1; S. & S. 742.]

§ 5838. Duty of commissioners in such case. The county commissioners, upon such notice being given, shall hear the application, and if, in their opinion, there is good reason therefor, shall require such officer to give a new bond, conditioned according to law, to their satisfaction, within such reasonable time as they may direct; and if such officer fail to execute such bond, the office shall be deemed vacant, and shall be immediately filled as other vacancies therein; but such original sureties shall not be released or discharged until the filing of the new bond, or the expiration of the time allowed therefor, and shall be liable only for the official acts of such officer from the time of the execution of the original bond to the filing of the second bond, or the expiration of the time allowed therefor; and the costs of such application shall be paid by the surety who makes the same. [62 v. 69, § 2; S. & S. 742.]

§ 5839. Sureties of constable or marshal may apply to be discharged. If a constable, or the marshal of a municipal corporation, neglect or refuse, on demand made for that purpose by a person entitled thereto, his agent or attorney, to pay all money by him received in his official capacity for the use of such person, a surety of such constable or marshal may give notice to the trustees of the township, or the council of the corporation, in which such constable or marshal resides, of his refusal or neglect to pay over money by him collected by virtue

of his office, and that he is unwilling to continue as his surety. [61 v. 103, § 1; S. & S. 743.]

§ 5840. **Proceedings by council or trustees in such cases.** The trustees or council, as the case may be, upon such notice being given, shall immediately inform the constable or marshal, in writing, of the refusal of his surety to continue as such, and that he is required to give a new undertaking, conditioned according to law; if such constable or marshal give such undertaking, to the satisfaction of the trustees or council, within ten days after receiving such notice, the sureties upon the first undertaking shall be released and exonerated from all further liability thereon; and if the constable or marshal fail to give a new undertaking within ten days after having received such written notice, such failure shall be deemed and taken as a resignation of his office, and the trustees or council shall proceed to fill such vacancy as is provided in other cases. [61 v. 103, § 2; S. & S. 743.]

§ 5841. **Sureties of treasurer of school fund may apply to be discharged.** A surety of the treasurer of school funds, in any school district organized under the provisions of law, may at any time notify the board of education of the proper district, by giving at least five days' notice, in writing, that he is unwilling to continue as surety for such treasurer, and will, at a time therein named, make application to the board of education to be released from further liability upon his bond; and he shall also give at least three days' notice in writing to such treasurer, of the time and place at which the application will be made. [70 v. 195, § 48.]

§ 5842. **Proceedings by board of education in such case.** The board of education, upon such notice being given, shall hear the application, and if, in their opinion, there is good reason therefor, shall require the treasurer to give a new bond, conditioned according to law, and to the satisfaction of the board, within such time as they may direct; and if the treasurer fail to execute such bond, the office shall be deemed vacant, and shall be immediately filled as other vacancies therein; but such original sureties shall not be released or discharged until the filing of the new bond, or the expiration of the time allowed therefor; and the costs of such application

shall be paid by the person making the same. [70 v. 195, § 48.]

§ 5843. Sureties of township officers may apply to be discharged. A surety of a justice of the peace, constable, township treasurer, or any township officer, may at any time notify the township trustees, by giving at least five days' notice, in writing, that he is unwilling to continue as surety for such officer, and will, at a time therein named, make application to the township trustees to be released from further liability upon his bond; and he shall also give at least three days' notice in writing to such officer, of the time and place at which the application will be made. [52 v. 127, § 1; 64 v. 13, § 1; S. & C. 809; S. & S. 743.]

§ 5844. Proceedings by township trustees in such cases. The township trustees, upon such notice being given, shall hear the application, and if they find that such officer neglects or refuses, on demand by a person entitled thereto, his agent or attorney, to pay over all money by him received in his official capacity for the use of such person, or if, in their opinion, there is other good reason therefor, they shall require such officer to give a new bond, conditioned according to law, and to the satisfaction of the trustees, within such time as they may direct; and if the officer fail to execute such bond, the office shall be deemed vacant, and shall be immediately filled as other vacancies therein; but such original sureties shall not be released or discharged until the filing of the new bond, or the expiration of time allowed therefor, but they shall be liable only for the official acts of such officer from the time of the execution of the original bond to the filing of the new bond, or the expiration of the time allowed therefor; and the costs of the application shall be paid by the person making the same. [52 v. 127, § 2; 64 v. 13, § 2; S. & C. 809; S. & S. 743.]

Where application was made to the township trustees by the sureties of a justice of the peace to be released from his bond, and thereupon the justice procured other persons to sign their names to his official bond, but with no seal attached, and without their names being inserted in the body of the instrument, it was held that this was not giving other security, and the obligations of the original sureties remained in full force, 19 O. S. 485.

§ 5845. Sureties may, by action, compel principal to

pay debt. A surety may maintain an action against his principal, to compel him to discharge the debt or liability for which the surety is bound, after the same becomes due. [51 v. 57, § 500; S. & C. 1095.]

A surety may proceed against his principal in equity to have his estate subjected to the payment of the debt without making payment himself, before commencing suit, 10. 533. When one of two partners is deceased and the other insolvent a surety for the firm having paid the debt may proceed in equity against the estate of the deceased partner without prosecuting a suit against the survivor, 5 O. 353. Creditor a necessary party, 31 O. S. 565, 567; see 34 O. S. 371, 375. The provisions of this and the next two sections do not affect the principle which releases the surety when, without his consent, the time of payment is extended by agreement between creditor and principal debtor, 14 O. S. 572. The section contemplates an original action by the surety against the principal and does not authorize the surety in an action brought against him by the creditor to bring in his principal for the purpose of having the relation of principal and surety certified under § 5419, 31 O. S. 565. When judgment has been rendered against principal and surety and the principal is insolvent, a court of chancery will entertain jurisdiction of a suit brought by the surety for the purpose of reaching credits of the principal, and appropriating them in payment of the judgment, although the surety has not paid the money, 15 O. 401. One of several sureties against whom judgment has been obtained can not sustain a separate action against the principal; but in such case when there is a joint judgment against several sureties, all must join in the action, 2 O. 209. Authority for appointment of receiver in action under this section, 45 O. S. 138. Surety's right of action to compel principal to pay debt exists in equity independent of statute, Id. 138.

§ 5846. When surety may have action for indemnity before debt due. A surety may maintain an action against his principal, to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist upon which, by the provisions of this title, an order may be made for arrest or for an attachment. [51 v. 57, § 501; S. & C. 1097.]

Surety can not, when proceeding for specific relief under § 5847, obtain an order of attachment by reason of the non-residence of the defendant, 2 D. 436. Sufficiency of affidavit for attachment in language of statute, 11 O. S. 579.

§ 5847. Surety may have any provisional remedy. In such action the surety may obtain any of the provisional remedies mentioned in division six of this title, upon the grounds and in the manner therein provided. [51 v. 57, § 502; S. & C. 1098.]

The effect of this section is to place sureties upon the same footing with creditors, in respect to the right of obtaining provisional remedies, 11 O. S. 579.

CHAPTER XIII.

TAXES AND ASSESSMENTS—RELIEF AGAINST ILLEGAL.

§ 5848. *Jurisdiction of common pleas and superior courts.* Courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof; but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected. [53 v. 178, §§ 1, 2; S. & C. 1551-2.]

Under our statute an enlarged or additional remedy is given to the tax-payer. While the action under it is still equitable in its nature, a remedy is afforded by it which formerly might be had only at law; the plaintiff is not required to make out a case in every element which would be necessary without it to entitle him to equitable relief; it is sufficient if he shows that the tax or assessment is illegal, 39 O. S. 301; 27 O. S. 536; 24 O. S. 253. The section affords an opportunity to establish the invalidity of a tax or assessment, and if judgment is rendered against the property owner it can not be properly said that his rights of property have been determined without due process of law, 49 O. S. 349.

Jurisdiction. The superior court of Cincinnati has jurisdiction, 25 O. S. 229, but had no jurisdiction over non-resident tax-payers, 2 C. S. C. R. 500. The supreme court has not original jurisdiction, 8 O. S. 393.

Injunction against illegal levy, etc. In an action to enjoin the collection of an assessment the burden of establishing a right to a perpetual injunction is upon the party who claims to be entitled to it, 43 O. S. 526. In an action to enjoin an assessment the party must show its invalidity by proper averment and proof. The assessment will be held valid until the contrary is made to appear, 35 O. S. 322. Inequalities in valuation do not constitute grounds for enjoining taxes in the absence of fraudulent discriminations, 37 O. S. 571.

Recovery back. Taxes paid under protest may be recovered back, 38 O. S. 319; 28 O. S. 521; 27 O. S. 527; if paid also under duress, *Id.*, 49 O. S. 608; 7 Bull 248. Payment of an illegal assessment under protest simply is not involuntary. It must appear that the treasurer was about to levy a distress upon the property, 48 O. S. 210; 23 Bull 229. Payment

to a county treasurer by an express company of illegal taxes on gross receipts from interstate business, under protest and with notice of an intention to recover back, when made to avoid the penalties imposed by § 2843, is involuntary and may be recovered back, 49 O. S. 608; affirms, 21 Bull 238. Taxes paid under a mistake of fact may be recovered back, 39 O. S. 354; but taxes voluntarily paid without protest or objection can not be recovered back, 40 O. S. 306; 9 Bull 16. In an action to recover back an assessment an averment in the petition that it was illegal and void is not sufficient. The facts must be stated, 44 O. S. 51. "The common law on the recovery back of taxes," see 14 Bull 248, 260.

Limitation. When an assessment is divided into installments the limitation runs against each installment from the time of its collection and not from the collection of the last installment, 44 O. S. 51. Limitation held to apply to action for recovery of overpayment on street assessments where mistake was one of calculation by city's agent, 51 O. S. 365.

What constitutes an involuntary payment. The cases are collected and commented on in 21 Bull 238, 240. To make the payment of an illegal demand involuntary, it must be made to appear that it was made to release the person or property of the party from detention or to prevent the seizure of either by the other party having apparent authority to do so without resorting to an action at law, 1 O. S. 268. The ruling in this case was modified in 11 O. S. 534, where it was held that a payment may be involuntary if there be an immediate and urgent necessity or the payment is made for the purpose of redeeming or preserving one's property. Where D. tendered to the treasurer of the county all the taxes legally due on a city lot which had been assessed by the city for the improvement of a street and the assessment had been certified to by the county auditor and placed on the duplicate for collection, said assessment being void for want of authority to make it, and the treasurer refused to receive the taxes legally due, unless D. would also pay the assessment and the lot was by reason thereof returned delinquent and was about to be sold and D. to prevent such sale, and under protest paid said assessment and taxes, it was held that the payment was involuntary, 27 O. S. 527; see 48 O. S. 210; 49 O. S. 608 *supra*. Payment of taxes held voluntary, 29 Bull 366.

§ 5849. Parties defendant to actions to enjoin levy. Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and benefit the levy is made; and if the levy would go upon the county duplicate, the county auditor must be joined in the action. [53 v. 178, § 2; S. & C. 1152.]

See, as to parties plaintiff, § 5005, notes—cited in 51 O. S. 517.

§ 5850. *Id.* To enjoin collection, and to recover back. Actions to enjoin the collection of taxes and assessments

must be brought against the officer whose duty it is to collect the same; actions to recover back taxes and assessments must be brought against the officer (1) who made the collection, or, if he is dead, against his personal representative; and when they were not collected on the county duplicate, the corporation which made the levy must be joined in the action. [53 v. 178, § 2.]

21 Bull 238.

1. 13 Bull 334. The action must be brought against such officer individually, and not in his official capacity, *Id.* 511.

§ 5851. Amount admitted must be paid or tendered, and undertaking given. If the plaintiff in an action to enjoin the collection of taxes or assessments admit a part thereof to have been legally levied, he must first pay or tender the sum admitted to be due (1); if an order of injunction be allowed, an undertaking must be given as in other cases; and the injunction shall be a justification of the officer charged with the collection of such taxes or assessments for not collecting the same. [53 v. 178, § 3; S. & C. 1152.]

1. 16 O. S. 614; 21 Bull 238; 3 C. C. R. 493, 496.

CHAPTER XIV.

TO CHANGE NAME.

§ 5852. What names may be changed. The names of persons, the names of towns, villages, and hamlets, and the names of companies or associations incorporated in this state, may be changed in the manner provided in this chapter. [40 v. 28, § 1; 51 v. 293, § 1; 50 v. 274, § 77; S. & C. 309, 317, 1138.]

Of villages and hamlets, §§ 1570, 1571.

§ 5853. Proceedings to change name of persons. A person desiring to change his name may file a petition in the court of common pleas or in the probate court of the county in which he resides, setting forth that he has been a *bona fide* resident of such county for at least one year prior to the filing of the petition, the cause for which the change of name is sought, and the new name asked for; and the court, upon being satisfied, by proof in open court, of the truth of the facts set forth in the petition, that there exists reasonable and proper cause for changing the name of the petitioner, and that

notice of the intended application has been given by one publication in a newspaper of general circulation in such county at least thirty days prior to filing of the petition, may order such change of name, and the probate judge is authorized to charge for his services in the proceedings the sum of three dollars and no more. [92 v. 28.]

§ 5854. **Id. Of town, village, or hamlet.** Not less than twelve freeholders of the vicinity may file a petition in the court of common pleas of the county, for the change of the name of any town, village, or hamlet in such county, setting forth the reason why such change of name is desirable, and the name proposed to be substituted; and the court, upon being satisfied by proof, that the prayer of the petitioners is just and reasonable, that notice as required in the last section has been given, that at least three-fourths of the inhabitants of such town, village, or hamlet desire such change, and that there is no other town, village, or hamlet in this state of the same name as that which is prayed for, may order such change of name. [40 v. 28, § 3; S. & C. 1138.]

§ 5855. **Id. Of corporation.** The directors or trustees of a corporation incorporated in this state may file a petition in the court of common pleas of the county in which its principal office is located, or, if it has no principal office, in the county in which it is situate, for a change of name of such corporation; and the court, upon being satisfied that thirty days' notice of the object and prayer of the petitioners has been given, by publication in a newspaper of general circulation in the county, and upon good cause shown, shall order the change of name as prayed for. [51 v. 293, §§ 1, 2; 50 v. 274, § 77; S. & C. 309, 317.]

§ 5856. **Id. Copy of order to be filed and publication made.** A copy of the order of the court shall be filed with the secretary of state, if the articles of incorporation were filed in his office, or with the recorder of the county, if the certificate was filed in his office; and in either case a copy of the order shall be published in some newspaper of general circulation in the county. [51 v. 293, § 3; 50 v. 274, § 77; S. & C. 309, 317.]

§ 5857. **Effect of change of name of corporation.** When the provisions of the last section have been complied with, such corporation shall thereafter be known by such new name, and shall have all the powers, and be subject to the same restrictions, as if no change of name had been

made; and no such change of name shall affect the rights of such corporation, or of any individual, or other corporation. [51 v. 293, § 4; 50 v. 274, § 77; S. & C. 309, 317.]

CHAPTER XV.

TO CONTEST WILL.

§ 5858. Person interested may contest will or codicil.

A person interested in a will or codicil admitted to probate in the probate court, or court of common pleas on appeal, may contest the validity thereof in a civil action in the court of common pleas of the county in which such probate was had. [51 v. 167, § 24; S. & C. 1216.]

A widow, though electing to take under, may contest will, 16 O. S. 353. The jurisdiction is original and not appellate, 20 O. S. 208; but the proceeding is in the nature of an appeal from the order of probate, 33 O. S. 598. Remainderman may bring the action, 3 C. C. R. 91. The mode of contesting a will admitted to probate as provided by § 24 of the probate act and § 19 of the wills act is exclusive, 29 O. S. 220. To invalidate a will for fraud or undue influence, it must appear that the fraud or influence complained of had some effect upon the testator in producing the very act of making his will, 17 O. S. 302. Proceeding to construe will see § 6202. In contest on ground that will was not legally executed and attested it is error to charge that the jury must be satisfied by a fair preponderance of all the evidence that the paper writing is not the last will of decedent or they must find that it is, 6 C. C. 294.

§ 5859. Necessary parties to the action. All the devisees, legatees, and heirs of the testator, and other interested persons, including the executor or administrator, must be made parties to the action. [75 v. 781, § 2.]

The omission to make a devisee or legatee a party is error for which the decree setting aside the will will be reversed, 35 O. S. 638. Executor is not bound to act, 7 O. S. 143.

§ 5860. Clerk to certify filing of petition to probate court. Upon the filing of the petition, the clerk shall certify that fact to the probate court in which the will is recorded, and the probate judge shall proceed as provided in title two. [§ 5936.]

§ 5861. Issue, trial, verdict, etc. An issue shall be made up, either in the pleadings or by an order on the journal, whether the writing produced is the last will or codicil of the testator, or not, which shall be tried by a jury, and the verdict therein shall be conclusive, unless a new trial be granted, or the judgment be reversed or vacated.¹ [82 v. 36; 50 v. 297, § 21; S. & C. 1618.]

¹52 O. S. 519.

Issue to be tried by a jury, 14 O. S. 157; 17 Id. 374, and the jury determine the question as to alterations, 33 O. S. 598. It is not the duty of the court to construe the will, 15 O. S. 90. The original will, and not a copy, must be produced, 33 O. S. 598. Admissions of devisee are not evidence, 13 O. S. 356. Judgment binds only the parties to the action, 17 O. S. 374; exceptions may be taken to ruling and charge of court, 8 O. S. 384. Verdict reviewable on error, 17 O. S. 134, 139. Where the testimony does not tend to prove the issue on the part of the plaintiff, showing incapacity of decedent, it is not error for the court at conclusion of plaintiff's testimony, to direct the jury to find a verdict sustaining the will, 44 O. S. 60.

§ 5862. **Order of probate court is prima facie evidence.** On the trial of such issue, the order of probate shall be *prima facie* evidence of the due attestation, execution, and validity of the will or codicil. [50 v. 297, § 22; S. & C. 1619.]

23 O. S. 491.

§ 5863. **When the testimony upon the probate is competent.** A certified copy of the testimony of such of the witnesses examined upon the probate as are out of the jurisdiction of the court, dead, or have become incompetent since the probate, shall be admitted in evidence on the trial. [50 v. 297, § 23; S. & C. 1619.]

§ 5864. **Conduct of the trial.** The party sustaining the will shall be entitled to open and close the evidence and argument; he shall offer the will and probate, and rest; the opposite party shall then offer his evidence; the party sustaining the will shall then offer his other evidence; and rebutting testimony may be offered as in other cases. [72 v. 167, § 1.]

See, before the last amendment, 6 O. S. 307; 11 O. S. 329; 15 O. S. 90.

§ 5865. **No appeal to circuit court. Error lies.** No appeal can be taken from the judgment of the common pleas court to the circuit court in cases to contest a will, but the right to prosecute proceedings in error in such cases shall be the same as provided in other cases brought in the common pleas court. [82 v. 36; 50 v. 297, § 24; S. & C. 1619.]

By the last amendment the right of appeal was taken away, 1 C. C. R. 476. Appeal was formerly allowed, 10 O. S. 447, and the right could not be taken away by agreement, 13 O. S. 573; but there was none from the Superior Court of Montgomery County to the district court, 23 O. S. 602.

§ 5866. **Limitation.** An action to contest a will or codicil shall be brought within two years after the same

has been admitted to probate, but persons within the age of minority, of unsound mind, imprisoned, or absent from the state, may bring such action within two years after such disability is removed. [83 v. 75; 50 v. 297, §§ 19, 25; S. & C. 1618, 1619.]

Saving of one inures to all, 20 O. S. 208; 10 O. 362; 52 O. S. 103.

CHAPTER XVI.

TO CURE CERTAIN DEFECTS, ERRORS, AND OMISSIONS.

§ 5867. When court must give effect to the intention of the parties. When, in an instrument in writing, or in a proceeding, there is an omission, defect, or error, by reason of the inadvertence of an officer, or of a party, person, or body corporate, whereby the same is not in strict conformity with the laws of this state, the courts of this state may give full effect to such instrument or proceeding according to the true and manifest intention of the parties thereto. [56 v. 40, § 1; S. & C. 1172.]

The provisions of this section are permissive, 20 O. S. 119. Want of seal to statutory certificate of parties organizing as a railroad corporation, 20 O. S. 190. Acknowledgment of certificate of incorporation of building association before notary instead of justice, 26 O. S. 483; see 34 O. S. 59. A mortgage made to a trustee to secure a *bona fide* indebtedness of a wife, but which omits the name of the trustee, is nevertheless valid, 40 O. S. 287. Where an error occurs in the name of a party to a written instrument apparent upon its face and from its contents susceptible of correction, so as to identify the party with certainty, such error does not affect the validity of the instrument, 44 O. S. 171.

§ 5868. Correction of certain errors, omissions, etc., by action. When any such error, omission, or defect occurs in an instrument or proceeding which is required to be made a matter of record, any party, person, body corporate, or persons intending and undertaking to become a body corporate, having or claiming an interest in the correction of such error, omission, or defect, may file a petition in the court of common pleas, setting forth particularly the error, defect, or omission complained of, and asking an order for the correction thereof. [56 v. 40, § 2; S. & C. 1172.]

§ 5869. In what county petition to be filed. When the record to be corrected is in any way connected with a body corporate, the petition shall be filed in the county

wherein the principal office of such corporation is located, and in all other cases in the county wherein the record is kept. [56 v. 40, § 3; S. & C. 1173.]

§ 5870. **How service to be made.** When the application is made by a body corporate, or by persons intending and undertaking to become a body corporate, notice of the application, specifying the error, defect, or omission complained of, and the time and place of hearing the same, shall be published for six consecutive weeks, in some newspaper of general circulation in the county where the application is made; and in all other cases service shall be made in the manner prescribed by law for making service in civil actions. [56 v. 40, § 2; S. & C. 1172.]

§ 5871. **Judgment and its effect.** The court, upon being satisfied that such mistake, error, or omission has been made, shall grant and make an order to correct the same, which order shall be filed in the office in which such record is required to be kept; and from and after such filing, such record, and the order correcting the same, shall be received as evidence in all cases, in all courts, the same as if no such error, omission, or defect had ever existed. [56 v. 40, § 2; S. & C. 1172.]

§ 5872. **Errors in deed by wife corrected.** The court of common pleas and superior courts may correct, amend, and relieve against, any errors, defects, or mistakes occurring in the deed or other conveyance of a husband and wife, executed and intended to convey or incumber the lands or estate of the wife, or her right of dower in the lands of her husband, in the same manner and to the same extent as such courts are or may be authorized or empowered to correct errors, mistakes, or defects in the deeds or conveyances of any other persons. [54 v. 199, § 1; S. & C. 694.]

The enactment of this section is authorized by the proviso of § 28, Art. II., of the constitution, and under it the court has the power to correct the mistake, whether the defect is in the execution or in the body of the instrument, and whether the mistake is that of the parties, or of an officer in taking or certifying the acknowledgment, 11 O. S. 641. In 20 O. S. 478, a deed of husband and wife was reformed so as to include the undivided interest of the wife, which by mistake the deed did not convey. A deed made by a married woman not in conformity with the statute, and her husband not joining with her in the

conveyance is a nullity, and as a contract for conveyance is alike void, 13 O. S. 565. Where an officer before whom a deed executed by husband and wife for the conveyance of the wife's estate in land was acknowledged, omits by mistake to certify the separate examination of the wife, such mistake may under the statute be corrected, 26 O. S. 153. A deed was reformed, although it was not acknowledged before an officer by the husband, and was defectively acknowledged by wife before an officer not authorized to take such acknowledgment, who made a defective certificate, 36 O. S. 549; but a deed duly executed and acknowledged by husband, but not signed or sealed by the wife, though privately acknowledged by her, was not reformed, 36 O. S. 585. When a notary public takes the acknowledgment of a deed after his term of office has expired, the defect could doubtless be relieved against under this section, 37 O. S. 73. Where parties deal with a mortgage defectively executed by a wife, they may be estopped from asserting its defective execution, 40 O. S. 441. A mortgage corrected by a decree of court, as between mortgagee and subsequent vendee who has taken the property *bona fide*, in payment of a pre-existing debt, will take effect only from the time of correction, 40 O. S. 632. The statute does not authorize the court to compel specific performance of a married woman's contract to convey, 36 O. S. 585.

Form of pleading, 11 O. S. 641.

CHAPTER XVII.

TO PERPETUATE TESTIMONY.

§ 5873. **Testimony may be perpetuated.** The testimony of a witness may be perpetuated as herein provided. [51 v. 57, § 363; S. & C. 1047.]

§ 5874. **Id. Petition.** The applicant shall file in the office of the clerk of the court of common pleas a petition, to be verified, in which shall be set forth, specifically, the subject matter relative to which testimony is to be taken, and the names of the persons interested, if known to the applicant, and if not known, such general description as he can give of such persons, as heirs, devisees, alienees, or otherwise; the petition shall also state the names of the witnesses to be examined and the interrogatories to be propounded to each; that the applicant expects to be a party to an action in a court in this state, or is a party to an action already commenced, in which judgment has been rendered and the execution thereof stayed by proceedings in error, that such testimony will, as he believes be material in the trial of said action, and

when the applicant expects to be the plaintiff, the obstacles preventing the immediate commencement of the action. [77 v. 195; 51 v. 57, § 364; S. & C. 1047.]

§ 5875. **Id. Order for examination of witnesses.** The court, or a judge thereof, may forthwith make an order allowing the examination of such witnesses; and the order shall prescribe the time and place of the examination, how long the parties interested shall be notified thereof, and the manner in which they shall be notified. [51 v. 57, § 365; S. & C. 1047.]

§ 5876. **Id. Cross-interrogatories.** When it appears satisfactorily to the court or judge that the parties interested can not be personally notified, such court or judge shall appoint a competent attorney to examine the petition, and prepare and file cross-interrogatories to those contained therein; the witnesses shall be examined upon the interrogatories of the applicant, and upon cross-interrogatories, where they are required to be prepared, and no others shall be propounded to them; nor shall any statement be received which is not responsive to some one of them; and the attorney who files the cross-interrogatories shall be allowed a reasonable fee therefor, to be taxed in the bill of costs. [51 v. 57, § 366; S. & C. 1047.]

§ 5877. **Taking and filing depositions.** Such depositions shall be taken before some officer authorized by law to take depositions, or before some person specially authorized by the court or judge, and shall be returned to the office of the clerk of the court in which the petition was filed. [51 v. 57, § 367; S. & C. 1047.]

§ 5878. **Approval and effect of same.** The court or judge, if satisfied that the depositions have been properly taken, and as herein required, shall approve the same, and order them to be filed; and if a trial be had between the parties named in the petition, or their privies or successors in interest, the depositions, or certified copies thereof, may be given in evidence by either party, when the witnesses are dead, or insane, or when their attendance for oral examination can not be required or obtained; but the depositions shall be subject to the same objections for irrelevancy and incompetency as may be made to depositions taken pending an action. [51 v. 57, § 368; S. & C. 1047.]

§ 5879. **Applicant to pay costs.** The applicant shall pay the costs of all proceedings under this chapter. [51 v. 57, § 369; S. & C. 1047.]

CHAPTER XVIII.

WATERCRAFT.

§ 5880. **What liabilities shall constitute a lien.** Any steamboat, or other watercraft, navigating the waters within or bordering upon this state, shall be liable, and such liability shall be a lien thereon, for all debts contracted on account thereof by the master, owner, steward, consignee, or other agent, for materials, supplies, or labor in the building, repairing, furnishing, or equipping of the same, or for insurance, or due for wharfage, and also for damages arising out of any contract for the transportation of goods or persons,¹ or for injuries done to persons or property by such craft, or for any damage or injury done by the captain, mate, or other officer thereof, or by any person under the order or sanction of either of them, to any person who is a passenger or hand on such steamboat or other watercraft, at the time of the infliction of such damage or injury. [78 v. 228; 57 v. 32, § 1; S. & C. 252.]

Watercraft is liable for materials furnished in its construction, 23 O. S. 565; labor in building, 18 O. 187 (but not for building when in hands of purchaser, 16 O. 276; see 15 O. 585); repairs, W. 660; stationery and printing for boat, but not newspaper advertisements, 7 O. S. 457; liable for hire of barge, 7 O. S. 478; wages of seamen, 12 O. 341; on contract for carriage, 17 O. 460; 16 O. S. 98 (but not for future carriage, 20 O. 54; 3 O. S. 325); supplies and debts contracted therefor, 11 O. 458; 1 C. S. C. R. 27, but not for supplies furnished outside of the state, 16 O. 178, nor for those furnished by a firm a member of which owned the boat, 2 O. S. 26; nor on executory contract therefor, 7 O. S. 377; nor for money loaned to pay for supplies, etc., 20 O. 62; 3 O. S. 325; nor for assault and battery committed by officers, 13 O. S. 255, out of the state, 10 O. S. 582; 11 O. S. 379; nor on maritime contracts, 28 O. S. 602; 25 O. S. 390; 18 O. S. 521; 1 C. S. C. R. 27, and these include, according to present rulings, contracts for repairs or supplies furnished to a boat at her home port, 28 O. S. 602; see 25 O. S. 390; a contract to transport passengers from Louisville to Cincinnati, 18 O. S. 521. Of maritime contracts the United States courts have exclusive jurisdiction saving the rights of suitors to pursue common-law remedies, 28 O. S. 602; 18 O. S. 521; 21 Wall 558, overruling 2 O. S. 26, 142; 3 O. S. 105; and a proceeding *in rem* for the breach of a maritime contract is not within the saving clause and can only be brought in the United States District Court, 28 O. S. 602; but no maritime lien arises on a contract for repairs or supplies

¹34 Bull 295.

furnished to a boat at her home port. It is therefore competent for the states, in such cases, to create liens therefor and provide remedies for their enforcement not inconsistent with the exclusive jurisdiction of the admiralty courts, 28 O. S. 602. Purchaser at private sale takes subject to liens, 14 O. 28, and mortgagee, 14 O. 72; 17 O. 359; but purchaser at judicial sale takes title divested of liens and liabilities, 14 O. 408.

Miscellaneous. There is no exemption in lieu of homestead under this chapter, 27 O. S. 517. Where the remedy is pursued against the craft by name the proceeding is *in rem* and no other notice need be given than that arising from its seizure, 3 O. S. 105; 2 O. S. 26. A judgment rendered by a court of this state in a proceeding under this chapter will not, in a collateral suit, be held void for want of jurisdiction, when it does not clearly appear that the judgment was rendered on a maritime cause of action, 25 O. S. 11. The statute gives no lien; it is created by the seizure, and if the craft is successively seized on several claims, the claims are to be satisfied successively, according to priority of seizure, 14 O. 408. The statute applies to special contracts for transportation of goods, in part on board a steamboat, and in part by other means, to a place beyond its line of navigation, as well as to contracts for transportation wholly on board the steamboat to places on its line of navigation, 16 O. S. 98. A mortgagee of a craft has not a lien preferable to the claims of creditors especially if the craft is running for the joint interest of owners and mortgagee, 14 O. 72, and a mortgage does not withdraw a craft from the operation of the provisions of this chapter; and in the distribution of the proceeds of a judicial sale of the craft, the mortgage must be postponed to the judgment against the craft, 17 O. 359. One who simply holds the legal title to a watercraft as security for the amount due him upon the sale of it, having neither the possession nor control of the craft, is not an "owner" within the meaning of §§ 5880 and 5882, and is therefore not liable for supplies furnished it, 47 O. S. 493.

§ 5881. When the liability arises out of the state. If a liability, as provided in the last section, arise beyond the jurisdiction of this state, a lien therefor shall attach, and may be enforced as provided in this chapter, except against purchasers without notice. [46 v. 78, § 1; S. & C. 256.]

§ 5882. The craft owner or master may be proceeded against. A person having a demand, as provided in § 5880, may proceed against the owner of the craft, or the master who contracted the debt, or against the craft itself. [38 v. 34, § 2; S. & C. 254.]

§ 5883. Petition against craft by name. Such person may file a petition as in a civil action, in the court of common pleas of the proper county, against the craft by name, or, if it does not have a name, by a pertinent and substantial description of the same. [61 v. 18, § 3; S. & S. 93.]

§ 5884. Summons and warrant for seizure to issue.

On the filing of the petition the clerk shall issue a summons, as in other cases, with a warrant returnable as other writs, directing the sheriff to seize the craft, or such part of her apparel or furniture as may be necessary to satisfy the demand, and to detain the same until discharged by due course of law; and the officer who executes the writ shall return it, with an inventory of the effects seized and held under it. [61 v. 18, § 4; S. & S. 93.]

§ 5885. Expenses to be advanced before seizure. The officer holding the warrant may require the plaintiff to deposit with him such sum of money as he deems reasonable and necessary to defray all necessary expenses in taking charge of, detaining, and securing the property; but in no case shall the officer pay to any person employed by him for such purpose more than two dollars per day for the time actually employed. [41 v. 51, §§ 1, 2; S. & C. 256, 257.]

§ 5886. Excess of money advanced to be repaid. The officer shall return an account of the expenses incurred by him under the last section; and if the amount deposited with him be greater than the sum by him expended, he shall pay the balance in his hands to the plaintiff, and if it be less than that sum, the plaintiff shall forthwith pay him the balance. [41 v. 51, § 3; S. & C. 257.]

§ 5887. How property seized may be discharged. The owner, master, steward, consignee, or other agent of such craft, may discharge the property seized by delivering to the officer who made the seizure an undertaking, with two sufficient sureties, resident of the county, payable to the plaintiff, in double the amount of his demands as stated in the petition, conditioned that the property shall be forthcoming to answer the judgment under the seizure. [38 v. 34, § 5; S. & C. 254.]

The bond is not binding unless the court had jurisdiction, 37 O. S. 682. It does not extinguish the officer's right to retake, 5 O. S. 201. The craft may be seized by others for subsequent liabilities, and they have preference, 14 O. S. 353. In such case, the bond is a substitute for the craft, 15 O. S. 292.

§ 5888. If action be commenced without cause, defendant may have damages. If an action be commenced under this chapter without reasonable or probable cause, the person commencing such action shall be liable to make compensation to the defendant for all damage

by him sustained by reason of the same; the defendant, if appearing and defending, and damaged as aforesaid, shall set forth in his answer, or in a written statement, if the cause be pending before a justice of the peace, that such action was commenced without reasonable or probable cause, to the damage of the defendant; and if, on the trial, it be found that such action was commenced without reasonable or probable cause, the damage sustained by the defendant shall be assessed, and for the amount so assessed judgment shall be rendered and execution issued as in other cases. [38 v. 34, § 8; S. & C. 255.]

§ 5889. Service and judgment. The return of the warrant showing a seizure of property shall be equivalent to service; if the judgment be for the plaintiff, the property held may be sold on the order of the court, and the surplus money shall be returned to the owner, master, or agent on demand; and if the judgment be against the plaintiff, the property seized shall be restored, and judgment for costs entered against him, upon which execution may issue as in other cases. [38 v. 34, § 6; S. & C. 255.]

§ 5890. Notice of sale by officer. The officer holding a writ for the sale of any craft, her apparel or furniture, shall, before he proceeds to sell the same, cause public notice to be given of the time and place of sale, for at least ten days previous thereto, by advertisement in a newspaper published in the county, or if no newspaper is published therein, then in a newspaper of general circulation in the county, and by advertisements posted in at least five public places in the county; and such sale shall be conducted in all other respects, and the court shall have the same power thereover, as sales upon execution. [49 v. 101; S. & C. 257.]

See § 5880, notes.

§ 5891. Owner or master liable for balance. If the proceeds of the sale do not satisfy the judgment, the owner of the craft, or master who contracted the debt, or incurred the liability, shall be liable in a civil action for the balance. [38 v. 34, § 6; S. & C. 255.]

§ 5892. Jurisdiction of justices. Justices of the peace within their respective counties shall have jurisdiction under this chapter when the amount claimed does not exceed three hundred dollars, and shall proceed as near as may be according to the rules prescribed herein for

other courts; but the bill of particulars of the plaintiff shall be verified by his affidavit. [72 v. 167, § 7.]

Formerly limited to one hundred dollars, 7 O. S. 261. Plaintiff not limited to amount named in bill of particulars, 18 O. 375.

§ 5893. **Appeals from judgment of justice.** Parties to any such action before a justice of the peace shall have the same right of appeal as in other cases; and if the judgment be against the craft by name or description, the owner, master, steward, consignee, or other agent, may appeal therefrom by entering into bond as in other cases. [38 v. 34, § 10; S. & C. 255.]

§ 5894. **Disposition of property after appeal.** If the plaintiff appeal, and perfect the appeal, the officer who seized the property shall retain the same, unless it be discharged as provided in § 5887; if the defendant appeal, and the appeal be perfected, the officer, on receiving the certificate of the justice of that fact, shall restore the property. [38 v. 34, § 10; S. & C. 255.]

TITLE IV.

ERROR, MANDAMUS, AND QUO WARRANTO.

CHAPTER I.

JURISDICTION AND PROCEDURE IN ERROR.

§ 6707. **What is a final order.** An order affecting a substantial right¹ in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title. [51 v. 57, § 512.]

Alimony. An order for alimony *pendente lite* is a final order, 17 O. S. 568; 38 O. S. 370, 558.

Allowance to widow, order overruling final, 46 O. S. 89.

Appeal. Dismissal of appeal is, 10 O. S. 623. Fixing amount of appeal bond is not, but mandamus lies, 1 C. C. 500.

Appropriation of property. Judgment confirming verdict is, 4 C. C. 49; 6 C. C. 521; and proceedings to reverse the judgment may be brought before compensation has been paid, 6 C. C. 362. Of private property, error does not lie till judgment for title, 7 O. S. 170. When an order of the probate court appropriating

¹ 34 Bull 320.

land for the roadbed of a railroad is reversed in the common pleas and the case retained for trial, the judgment of reversal is not a final order, 39 O. S. 170; see 6 C. C. 521, 539.

Arrest. Overruling motion to discharge from arrest is, 8 Rec. 428; 4 Bull 1037.

Attachment. And an order discharging an attachment, 5 O. S. 42; 9 Id. 388; 41 Id. 271; and order of justice overruling motion to discharge attachment, 42 O. S. 102; 46 O. S. 52; 7 C. C. 206.

Contempt. Commitment for contempt is, 2 W. L. G. 193; 46 O. S. 473.

Conditional order to assign a land certificate, 1 O. 372.

Costs. But an order for payment of costs pending case is not, 23 O. S. 626; and dismissal for want of surety for costs is not for appeal, 2 W. L. M. 600.

Counter-claim. Nor finding an order as to counter-claim, 2 H. 131.

Cross-petition. Dismissal of cross-petition is, 35 O. S. 307.

Default judgment. Order setting aside default judgment is, 2 H. 178; 46 O. S. 639.

Definition of final order, 13 O. 408; 1 O. S. 511; 11 Bull 105; 12 Id. 20, 23.

Demurrer. Ruling on demurrer is not a final order, 6 O. S. 199; 3 C. C. 431; Final judgment is necessary, 6 Bull 379; 5 Rec. 410.

Dismissal without prejudice is not under justice's code, 31 O. S. 463, nor dismissal for want of surety for costs, for appeal, 2 W. L. M. 600; dismissal of appeal is, 10 O. S. 623, and order vacating dismissal is, 12 O. S. 136.

Finding of facts required on reservation of case must justify a final judgment, 44 O. S. 487.

Forcible entry, etc. Judgment of justice in forcible entry and detainer is, 10 O. S. 318; but the refusal of the court of common pleas to allow a petition in error in such proceeding is not reviewable, 42 O. S. 249.

Homestead. Allowance of homestead is a final order, 34 O. S. 42.

Injunction. Order dissolving injunction is not for error, 1 C. S. C. R. 255. Order of common pleas dissolving or overruling a motion to dissolve is, 45 O. S. 631; 3 C. C. R. 455; but not at chambers, 48 O. S. 308.

Insanity. Proceedings to test are not reviewable, 36 O. S. 145.

Interlocutory decree. Distinction between interlocutory and final decree, 13 O. 408; 1 O. S. 511.

Judgment. Order vacating judgment is a final order, 12 O. S. 136; default judgment, 46 O. S. 639. Decree settling all rights except amount is, 12 Bull 20.

Mandamus. Refusal by circuit court to allow peremptory mandamus after a hearing upon issue joined is, 43 O. S. 457.

Master's report. And order confirming master's report, 1 O. S. 511, but not an order referring case to master, 11 Bull 105.

Money. Order appropriating money between different judgment creditors is, 3 O. 135.

New trial. Order for new trial is not, 23 O. S. 601; 34 Bull 106; but granting a new trial on petition under § 5309 is, 6 O. S. 221.

Partnership. Decree on settlement of partnership is, 26 O. S. 429.

Receiver. Order appointing a receiver is not final for appeal, 10 O. S. 623; but proceedings for appointment and removal of receivers affecting substantial rights are reviewable on error, 31 O. S. 1; 2 C. C. R. 518;

Referee. Refusal to confirm referee's report is not a final order, 2 Clev. R. 185.

Removal of cause. An order for removal of a cause to federal court is, 20 O. S. 175, and an order of common pleas in proceedings to contest removal of county seat is, 19 O. S. 189.

Reservation. Finding of fact on reservation of case must justify a final judgment, 44 O. S. 487.

Reversal of judgment. When the common pleas reverses a judgment of a justice of the peace or probate court and retains the case for trial, the judgment of reversal is not a final order, 12 O. 216; 39 O. S. 170; 12 Bull 211; *contra*, where the judgment of the common pleas or superior court is reversed and the cause remanded for further proceedings. Error will lie to reverse the judgment of reversal while the cause is still pending in the court to which it has been so remanded, 17 O. S. 183; see 21 O. S. 620; 22 Id. 118; but the judgment of the district court reversing the judgment of the common pleas with costs, and remanding the cause to the common pleas for execution, is not a final order, 42 O. S. 445; see 6 C. C. 213. By the act of April 18, 1883 (80 v. 169), the supreme court had no power to reverse a judgment of the district court reversing a judgment of the common pleas and remanding the cause for a new trial on the merits, 44 O. S. 438. This act was repealed and supplied by the amendment of February 7, 1885 (82 v. 36), and the latter repealed and supplied by the amendment of May 4, 1885 (82 v. 230).

Sale. An order confirming a sale is a final order, 1 O. S. 511, and an order defeating a sale, 35 O. S. 430, and a decree for sale on mortgage and finding amount due, 7 O. (Pt. 2) 48.

Second trial. Allowance of second trial, final order, 25 O. S. 29.

Stockholder. Dissolution, §§ 5652, 5673. See 34 Bull 320.

Striking case from docket is a final order for error, but not for appeal, 7 O. S. 233; striking out an answer is, 48 O. S. 443; striking out part of answer is not, 6 O. S. 199.

Taxes. Order of common pleas in application to redeem land sold for taxes is, 3 O. 277; appeal did not lie in such case, Id. 301.

‡ 6708. Jurisdiction of common pleas in error. A judgment rendered or final order made by a probate court, justice of the peace, or any other tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the court of common pleas, may be reversed, vacated, or modified by the court of common pleas. [51 v. 57, ‡ 511; S. & C. 1099.]

Error lies from a judgment of the common pleas reversing a judgment of conviction in mayor's court, 40 O. S. 253. A judgment of a justice of the peace in forcible entry and detainer is judgment within the meaning of this section, 10 O. S. 318. The refusal of the common pleas to allow a petition in error, in such proceeding, is not reviewable in the district court on a petition in error, 42 O. S. 249. An order of a justice overruling a motion to discharge an attachment is reviewable on error, 42 O. S. 102; 46 O. S. 52. The final orders of township trustees establishing ditches, drains, and watercourses, may be reviewed by petition in error, and reversed for errors apparent on the record. Such procedure and not injunction is the appropriate remedy for the correction of such errors, 45 O. S. 496. The appropriate remedy for

defects and irregularities apparent on proceedings before county commissioners to cause improvement under two mile assessment pike law is by petition in error, 46 O. S. 663. As to review of proceedings of Board of Review acting as a decennial board of equalization, see 28 Bull 67, 73.

§ 6709. **Jurisdiction in error of the circuit court.** A judgment rendered, or final order made by any court of common pleas, may be reversed, vacated or modified by the circuit court of the county wherein such court of common pleas is located, for errors appearing upon the record. All errors assigned in the petition in error shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, the circuit court shall, in its mandate to the court below, state the error or errors found in the record upon which the judgment of is founded. [91 v. 278.]

When Supreme Court will not review judgment of reversal, 33 Bull 319.

The circuit court has no jurisdiction to review an order of the common pleas court made at chambers, 5 C. C. 118; 48 O. S. 308; the circuit court can not in a proceeding in error find from the evidence contained in a bill of exceptions the facts and state them separately from its conclusions of law, 48 O. S. 634; 46 Id. 102, 558. Must pass upon all errors assigned, 34 Bull 233.

§ 6709a. **Superior court of Cincinnati.** *Repealed May 16, 1894.* [91 v. 278.]

Superior Court of Cincinnati — Judgment of, how reviewed. A judgment rendered, or final order made, by the Superior Court of Cincinnati at general term, may be reversed, vacated or modified by the supreme court for errors appearing on the record. [499 R. S.]

Jurisdiction in error of superior court of Cincinnati. A judgment rendered, or final order made by said superior court of Cincinnati at special term, may be reversed, vacated or modified by said superior court at general term for errors appearing in the proceedings at special terms or by exceptions taken, in accordance with chapter 4, title 1, division 3, part 3, of the Revised Statutes. The proceedings to obtain such reversal, vacation or modification, shall be by petition, to be entitled "Petition in error," and shall be the same as those provided by chapter 1, title 4, part 3, of the Revised Statutes, upon petitions in error, except that it shall not be necessary to file with the petition a transcript of the proceedings, but the petition in error shall be

heard upon the original files, pleadings and proceedings; and the said superior court, at general term thereof, shall have the power to render such judgment as should have been rendered at special term, or remand the cause to the special term for judgment, and upon such judgment execution may issue as upon original judgments; provided, that no judge of said superior court shall sit on the trial or hearing in said superior court in general term of a petition in error to reverse a judgment rendered or decision made by such judge in special term. [§ 499a, R. S.]

Proceedings when judge of superior court disqualified to sit. Whenever one of the judges of the superior court of Cincinnati shall be disqualified from sitting in the hearing of any cause in the general term of said court, his place in such hearing shall be taken by a judge of the court of common pleas of Hamilton county, to be designated as follows: The judges of said court of common pleas shall, in the month of September of each year, designate and assign one of their number to sit in the hearing of cases in the general term of said superior court for the year, beginning with the first day of October next ensuing; and should the term of office of the judge so designated and assigned end before the expiration of such year, another judge shall in like manner be designated and assigned for the residue of such year. Should more than one judge of said superior court be disqualified to sit in any cause in the general term thereof, a certificate to that effect shall be issued by said court to the supervisory judge of said court of common pleas, who shall thereupon designate and assign such additional number of judges of said court of common pleas as may be necessary, to sit in the hearing of such cause. Designations and assignments so made by said court of common pleas, or the supervisory judge thereof, shall be entered upon the minutes of the judges of said court sitting in joint session, and copies of such entries shall be certified to said superior court of Cincinnati and entered upon the minutes of the general term thereof. [§ 499b R. S.]

These sections apply to actions pending in superior court at special term when the act took effect, July 1, 1894.

Questions arising at special term may be reserved for general term—How reviewable. Any judge of the superior court of Cincinnati sitting in special term, may reserve and adjourn for the decision of such court in general term, any question of law or fact arising in any case upon the record, or upon evidence in writing, and when the decision of such questions authorizes or requires a final order or judgment, the same may be entered by the court in general term. Judgments and final orders of such superior court, in general term, shall be reviewable only by the supreme court; all laws providing for the review of final orders and judgments of circuit courts shall apply to final orders and judgments of such superior court in general term. [§ 503.]

Section 4 of the act to re-establish the jurisdiction of the general term superior court of Cincinnati, provides, that section 1 of the act passed January 30, 1894, amending section 6709 of the Revised Statutes, as amended April 17, 1893, and supplemental section 6709a, enacted April 18, 1893 (90, O. G. L., 191), and section 6710 of the Revised Statutes, as amended May 4, 1885 (82, O. L., 230), be and the same are hereby repealed; provided, however, that said section 6709a and section 1 of said act passed January 30, 1894, [section 6709] shall continue in force in so far as the same affect judgments rendered and final orders made by the superior court of Cincinnati at special term prior to the taking effect of this act; but this act shall apply to all actions and proceedings, which may be pending and undetermined in the superior court of Cincinnati at special term when this act takes effect. The act took effect July 1, 1894. "Pending" cases, 1 N. P. 195.

§ 6710. Jurisdiction of supreme court in error. A judgment rendered, or final order made, by the circuit court, any court of common pleas, probate court, or the superior court of any city or county, may be reversed, vacated or modified by the supreme court, on petition in error, for errors appearing on the record; but no petition in error in such cases, except as to the judgment or final order of the circuit court, or of the general term of the superior court of Cincinnati, shall be filed without leave of the supreme court, or a judge thereof, and the supreme court shall not in any civil cause or proceeding, except when its jurisdiction is original, be required to determine as to the weight of the evidence; and on application of any party excepting to a ruling or decision of the circuit court during the trial, or on a motion for a

new trial, such court shall find from the evidence, and state on the record the facts upon which the alleged error arises, or which may be material in determining whether error has intervened or not. [91 v. 278.]

Circuit court not required to make finding of fact, 46 O. S. 102, 558. The supreme court can not examine a bill of exceptions to determine whether the verdict is against the weight of the evidence, 39 O. S. 123; see 45 O. S. 1; 46 O. S. 52, 527, 558. As to when the act 80 v. 169 took effect, see 39 O. S. 573. Under it the supreme court had no power to reverse a judgment of the district court reversing a judgment of the common pleas, and remanding the cause for a new trial on the merits, 44 O. S. 438. When the circuit court dismissed a petition in error, upon the alleged ground that summons in error had not been served within two years and no bill of exceptions was taken to this order, but the court stated the facts found, it was held that under this section as amended (82 v. 230) the order of dismissal was not reviewable upon such record in the supreme court, 44 O. S. 526.

Error lay to the district court from the supreme court in election contests, 15 O. S. 573; from the supreme court to the common pleas in cases appealed from the county commissioners, 43 O. S. 210; from the supreme court to the probate court in proceedings to appropriate property, 5 O. S. 276; not from common pleas in such cases, 39 O. S. 170. If relief can be had in the district court, it must be sought there, unless there is special reason for coming to the supreme court, 3 O. S. 509; 34 O. S. 163.

§6711. The record in the supreme court must be printed—Exceptions. When a petition in error is filed in the supreme court, so much of the record to be reviewed as will show the error complained of shall be printed, and ten of the printed copies thereof filed with the papers, which printing the plaintiff in error may have done, or he may deposit with the clerk sufficient money to pay the cost thereof; and if he fail for sixty days after filing the petition to file such printed copies or make such deposit, the petition in error shall be dismissed, unless the court, on good cause shown, extend the time or dispense with such printing; and the fair expense of such printing shall be taxed as part of the costs. Provided, that where proceedings in error are instituted by any administrator, executor, trustee or guardian, in his trust capacity, the court shall, on application of said plaintiff in error, dispense with the printing of such record, when it is made to appear by the affidavit of the

plaintiff in error that the estate represented by him has no funds with which to pay for such printing.

The clerk shall deliver to the court, at each monthly call of the docket, a list of cases in default under this section, and the court shall call the same, and make disposition thereof, as herein provided. [91 v. 335; 80 v. 169; 75 v. 804, § 5.]

Dismissal of petition in error for want of printed record held a bar to a second petition in error, 36 O. S. 93. The provision of this section as to the time within which records must be printed has no application to cases reserved from the district court, 38 O. S. 373; see rule 5, supreme court, 35 O. S. 396. The act of 1878 incorporated into the revised statutes as § 6711 has no application as to the matter of printing, to cases pending in the court previous to September 1, 1878, *Id.* Where the right to move for the dismissal of a case for non-compliance with the provisions as to printing, was complete under the act of 1878, such right was not affected by the repeal of that act by the revised statutes, 35 O. S. 479. Type written record insufficient, 24 Bull 265.

§ 6712. When supreme court shall assess penalty. When, in any such case, the judgment or final order of a circuit court is affirmed, there shall be taxed, as part of the costs in the case, a reasonable fee, to be fixed by the court, not less than twenty-five nor more than three hundred dollars, to the counsel of the defendant; and the court shall adjudge to the defendant damages in such sum as may be reasonable, not exceeding five hundred dollars, unless the judgment or final order of the circuit court directs the payment of money, and execution thereof was stayed in such proceeding in error in the supreme court, when, in lieu of such penalty, it shall bear additional interest, at a rate not exceeding five per centum per annum, for the time for which it was stayed, to be ascertained and awarded by the court (1); but if the supreme court certify in its judgment that there was reasonable cause for the proceeding in error, neither such fee, nor additional interest, nor penalty, shall be taxed, adjudged, or awarded (2). [82 v. 37; 75 v. 804, § 6.]

1. 2 W. L. M. 272, 418. Part payment relieves *pro tanto*, 8 O. 60; 19 O. 26; has no preference as lien, 14 O. S. 349. 2. 17 O. 605; 19 O. 26.

§ 6713. Petition and summons in error. The proceedings to obtain such reversal, vacation, or modification shall be by petition in error, filed in a court having power to make the reversal, vacation, or modification,

and setting forth the errors complained of; thereupon a summons shall issue and be served, or publication made, as in the commencement of an action, and a service on the attorney of record in the original case shall be sufficient; the summons shall contain a statement that a petition in error has been filed in the case; and if issued in vacation, it shall be returnable on or before the first day of the term of the court, and if issued in term time, it shall be returnable on a day therein named; and if the last publication, or service of the summons, be made ten days before the end of the term, the case shall stand for hearing at that term; but the supreme court, on the hearing of a motion for leave to file a petition in error, whereof ten days' personal notice has been given to the adverse party, or his attorney, may, in its discretion, at the time of granting such leave, if error, for which the judgment or final order should be reversed, vacated, or modified, plainly appear on the record, and all the judges sitting at the hearing concur therein, enter a judgment of reversal, vacation, or modification, without the issue or service of a summons in error. [72 v. 172, § 515.]

Parties. All parties interested must be made parties, 14 O. S. 287; all parties below must be made parties, 41 O. S. 179; must be summoned, 3 O. S. 337; W. 138, or appear, 21 O. S. 620. Persons who have an interest in the subject matter affected by the judgment or final order are proper parties, 1 O. S. 1. See 11 C. C. 528.

Cross-petition. Defendant in error may file a cross-petition asking the reversal of the judgment for errors prejudicial to him and not assigned in the plaintiff's petition; and it is not error in the court to hear the case upon both petitions at the same time, and to reverse the judgment for such errors, 22 O. S. 516.

Election contest. "Contestee" in election contest case, party to the record, is a proper party to prosecute error, 19 O. S. 189.

Executor or administrator must be made party defendant in case of judgment against deceased party, 15 O. S. 300; 35 O. S. 244. Proceedings in error can not be instituted in the name of a deceased party, 35 O. S. 660.

Heirs must be made parties in action to recover land, 21 O. S. 620.

Joint judgment. All defendants in a joint judgment are necessary parties to a petition in error prosecuted by one of them, 14 O. S. 287; 30 O. S. 20; 45 O. S. 444; 3 C. C. 290. In a joint judgment error as to one is error as to all, 14 O. S. 413; 21 O. S. 131. A joint judgment debtor—partner—omitted by mistake, may be made a party plaintiff though the statutory period in which error may be brought has elapsed, 39 O. S. 218. The omission, as party to a petition in error, of one of the defendants in the lower court will not deprive the reviewing court of jurisdiction, and if the defendant in error does not make the objection in the district court he can not in the supreme court, 40 O. S. 431; see § 6723nn. See 9 C. C. 444.

Judgment creditor of defendant can not prosecute error, W. 737.
Master commissioner or other party entitled to have fees taxed as costs in an action can not in his own name prosecute a proceeding in error to reverse an order of the court for retaxing the costs or disallowing his claim for fees, 26 O. S. 312.
New trial. 5 C. C. 470.

Privies must allege and show their interest, 35 O. S. 244.

Promissory note. Where the action was against three makers and the indorser of a promissory note, and one of the makers only made a defense and judgment was rendered against all, it was held that the maker who answered, filed his petition in error, must submit to a judgment of dismissal unless he made the co-makers or indorser parties, 13 O. S. 568. See 9 C. C. 444.

Release. Where judgment in a civil action is taken against several defendants, only some of whom have appeared in the action or been served with process, and those not appearing or being served afterward release all error in the proceeding, the defendants served with process can not reverse the judgment for such error or irregularity, 21 O. S. 181. Injunction against judgment at law does not operate as a release of errors, 3 O. 20.

Revivor. After error has been assigned, a judgment of reversal is valid even though one of plaintiffs in error has deceased and his legal representative has not been made a party to the proceedings in error, 2 C. C. 1; 38 O. S. 96. Where a defendant to a petition in error and to cross-petitions in error dies and the case is duly revived on the application of the plaintiff in error against the administrator and heirs of the defendant, it is unnecessary to apply for or make an order of revivor as to the cross-petitions, 40 O. S. 468.

Sheriff's sale. Purchaser at sheriff's sale can not prosecute error, W. 574.

Setting aside sale. Judgment setting aside sale can not be reversed as to some of the parties and affirmed as to others, 21 O. S. 131.

Waiver. The provision of the code that if no objection be taken on account of defect of parties the defendant will be deemed to have waived the same, applies to proceedings in error, 17 O. S. 69.

From what judgments or orders error lies:

Alimony. It lies from order for alimony *pendente lite*, 17 O. S. 563; 38 O. S. 370.

Amendment, does not lie from order amending pleadings, 6 O. S. 199.

Attachment, lies from order discharging attachment, 5 O. S. 42; see 42 O. S. 102.

Bastardy, lies in bastardy proceedings, 6 O. S. 252.

Consent judgment, does not lie from judgment by consent, 16 O. S. 163; see 35 O. S. 107.

Condemnation case, does not lie from judgment of common pleas in, 39 O. S. 170.

Conviction under city ordinance, lies to judgment reversing, 40 O. S. 253; reversal of judgment of conviction not reviewable, 43 O. S. 457.

Costs, when error lies for taxation of, 30 O. S. 208.

Custody of children, lies from order as to custody of children in divorce cases, 38 O. S. 558.

Deceased person, from judgment against deceased person, 15 O. 300.

Discretionary matters, does not lie as to matters resting in the discretion of the court—as setting aside a levy, 3 O. 269; per-

mitting separation of jury during a trial, 15 O. 72; amendments, 17 O. 293; the examination of a witness who remained in court contrary to its order, 18 O. 99; directing a special verdict, 8 O. S. 570; the continuance of a cause, 11 O. S. 691—unless the discretion is grossly abused, 36 O. S. 201.

Divorce. Error does not lie in cases of divorce and alimony, 6 O. S. 64; see § 5706.

Executor's sale of land. It lies from supreme court in sale of lands by executor to pay debts 7 O. (Pt. 2) 138.

Final judgment, lies only from final judgment, order, or decree, see § 6707, notes.

Habeas corpus, lies in habeas corpus proceedings, 6 O. S. 55.

Judge at Chambers, lies from order of, 19 O. S. 189.

Mandamus, from refusal of mandamus, 43 O. S. 457.

Municipal corporation, from proceedings by municipal corporation in opening streets, 2 O. S. 228, formerly not, 14 O. 240.

Partition, appeal now lies from proceedings in partition, 49 O. S. 374, formerly error, 13 O. 548.

Assignment of errors. A reviewing court is not bound to notice errors in the record which have not been specifically assigned, 8 O. S. 243; 1 O. S. 386. When there is no assignment judgment may be affirmed, 1 O. S. 386. Errors not assigned in the district court will not be considered in the supreme court, 33 O. S. 555, and only those errors assigned in the district court are considered, on error, to reverse judgment of district court affirming that of common pleas, 17 O. S. 262; 33 O. S. 555. Errors not assigned are presumed to have been waived, 32 O. S. 514, and when waived, or not objected to below, can not be assigned, 10 O. S. 557; 25 O. S. 554. The court will not look beyond the assignments specially made in the court below unless there was a general assignment in that court, 6 O. S. 473; 17 O. S. 262; 27 Id. 592; 29 Id. 327, and when there is a general assignment it is the duty of the court to examine the whole record, 15 O. 557; 2 O. S. 21. While the court is not bound to notice errors not specifically assigned, supra, it may consider errors not assigned at all—such as those relating to jurisdiction, 22 O. S. 38; 30 O. S. 133; but notice of the objection that the petition does not contain facts sufficient to constitute a cause of action, should, in some form, appear on the record in the reviewing court before the case is heard, 30 O. S. 133. *Answer* alleging facts after judgment, 32 O. S. 76; 39 Id. 54; 3 C. C. R. 209; assignment can not be made outside the record, 5 Rec. 439. Finding on evidence can only be impeached by motion for a new trial. A general assignment does not reach it, 33 O. S. 555. Assignment of error is a pleading, 1 O. S. 386. No answer or demurrer necessary, 2 W. L. M. 465. Default not objected to can not be assigned for error, 44 O. S. 12, 15.

§ 6714. *Issue and service of summons.* The summons mentioned in the last section shall, upon the written precept of the plaintiff in error, or his attorney, be issued by the clerk of the court in which the petition is filed, to the sheriff of any county in which the defendant in error, or his attorney of record, is found; when the writ is issued to a foreign county, the sheriff thereof may return it by mail to the clerk, and shall be entitled to the same fees as if it had been returnable to the court of common pleas of the county in which such officer re-

sides; and the defendant in error, or his attorney, may waive, in writing, the issue or service of the summons. [51 v. 57, § 516; S. & C. 1103.]

Where the summons is only directed to one defendant, service on the attorney of all the defendants is only good as to the defendant named in the summons, 21 O. S. 131. Service on the attorney after the death of the party is invalid, 15 O. 300. Where party dies after waiver of process and entry of appearance indorsed on petition in error by attorney of record, before filing of petition in error, and no other service is had, case should be dismissed, 49 O. S. 372. An affidavit by an ex-deputy sheriff that, "to the best of his knowledge and belief," he served a summons in error, does not give the court jurisdiction of a defendant in error, where no evidence of either service or return is furnished by the docket of the supreme court or of the sheriff, 40 O. S. 231. Where a cross-petition in error is properly filed against a party already in court in the pending case on error, no summons in error should be issued for such defendant, 40 O. S. 468. Defendant in error is estopped after appearing and submitting the case, either upon oral argument or printed briefs, to question the jurisdiction of the court, upon the ground that no summons in error was issued or served, 43 O. S. 57.

§ 6715. When summons must not issue. A summons in error shall not be issued in a case in which there is, upon the minutes of the court, or among the files of the case, a waiver of error by the party endeavoring to commence such proceedings, or his attorney, unless the court in which the petition is to be filed, or a judge thereof, indorse on the same permission to issue the summons. [51 v. 57, § 609; S. & C. 1135.]

§ 6716. What must be filed with petition in error. The plaintiff in error shall file with his petition either a transcript of the final record, or a transcript of the docket or journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of; and, if original papers and pleadings are filed, and the final record has not been made, the reviewing court may permit the temporary withdrawal of the originals for a reasonable time, to allow the recording thereof, or direct copies thereof to be made and filed, and the originals to be returned to the inferior tribunal. [67 v. 114, § 517; S. & C. 1104.]

Court can not accept original papers as substitute for transcript, 15 O. S. 484; see 23 O. S. 581. The transcript mentioned in this section is a complete transcript and not a copy of the journal entries merely, 3 O. S. 490. Dismissal for failure to file, 5 Bull 14; defect amendable, 3 Bull 325. Petition will not be dismissed when the transcript is filed but not indorsed by the

clerk, 33 O. S. 213. Bill of exceptions must be authenticated by the clerk and identified as the bill of exceptions allowed in the case, 27 O. S. 599. It is one of the original papers in the case and is properly a part of the record, without an express order to that effect, *Id.* 46. Where all the original papers in a case necessary to exhibit the error complained of are not filed with the petition in an error case, this does not deprive the reviewing court of jurisdiction thereof, but such court may require the provisions of the statute to be complied with, and on a failure by the plaintiff in error to do this, may dismiss the case, 7 C. C. 363.

§ 6717. Transcript must be furnished on tender of proper fees. Probate judges, justices of the peace, and other judicial tribunals having no clerk, and the clerks of every court of record, shall, upon request, and being paid the lawful fees therefor, furnish an authenticated transcript of the proceedings, containing the judgment or final order in said courts, to either of the parties to the same, or to any person interested in procuring such transcript. [51 v. 57, § 518; S. & C. 1104.]

§ 6718. How execution of judgment may be stayed. No proceeding to reverse, vacate, or modify a judgment or final order rendered in the probate court, common pleas court, or circuit court, except as provided in the fourth subdivision of this section, and in §§ 6720 and 6721, shall operate to stay execution, unless the clerk of the court in which the record of such judgment or final order is made take a written undertaking, to be executed on the part of the plaintiff in error to the adverse party, with sufficient surety, as follows:

1. When the judgment or final order sought to be reversed directs the payment of money, the written undertaking shall be in double the amount of the judgment or order, to the effect that the plaintiff in error will pay the condemnation money, and costs, if the judgment or final order be affirmed, in whole or in part.

2. When it directs the execution of a conveyance, or other instrument, the undertaking shall be in such sum as may be prescribed by a court of record, or a judge thereof, to the effect that plaintiff in error will abide the judgment, if the same be affirmed, and pay the costs.

3. When it directs the sale, or delivery of possession, of real property, the undertaking shall be in such sum as may be prescribed by a court of record, or a judge thereof, to the effect that, during the possession of such property by the plaintiff in error, he will not commit,

nor suffer to be committed, any waste thereon, and that, if the judgment be affirmed, he will pay the value of the use and occupation of the property from the date of the undertaking until the delivery of the possession, pursuant to the judgment, and all costs; and when the judgment is for the sale of mortgaged premises and the payment of a deficiency arising from the sale, the undertaking must also provide for the payment of such deficiency.

4. When it directs the assignment or delivery of documents, they may be placed in the custody of the clerk of the court in which the judgment was rendered, to abide the judgment of the reviewing court, or the undertaking shall be in such sum as may be prescribed as aforesaid, to abide the judgment, and pay costs, if the judgment be affirmed. [82 v. 37; 51 v. 57, § 519; S. & C. 1104.]

The bond need only substantially conform to the statute, 1 O. 170. Where one of several defendants against whom judgment had been rendered, prosecuted error alone against the adverse party, and judgment was affirmed, it was held an action could be sustained upon such bond, though there was a defect of parties plaintiff in error, and a second petition in error by all the parties was pending, 29 O. S. 620. A bond conditioned to prosecute writ of error to effect and abide the judgment binds the obligors to pay the amount of the judgment, and in the declaration upon such bond it was not necessary to aver that the writ of *supervacuas* was taken out by the plaintiff in error, 5 O. 169. Where the relief desired during the pendency of the proceeding in error is an order to stay further action in the proceedings which, by the original action, the plaintiff seeks to enjoin, such relief should be sought under § 5573; 36 O. S. 316. Section cited in 3 C. C. 392; 5 Id. 215; 3 N. P. 61.

1. In an action on such undertaking, affirmance of judgment as to one defendant forfeits the bond as to all, 3 Bull 11; 1 Clev. R. 89. The nature and extent of the obligation should be alleged in the petition, showing the facts, amount, and foundation of plaintiff's claim, 1 D. 161; see 2 C. C. R. 459; 3 Id. 484. Where judgment is rendered in the common pleas for money only and it is affirmed by the circuit court, defendant, on filing his petition in this court to reverse the judgment below, is entitled to a stay of execution on giving an undertaking in double the amount of the judgment to the acceptance of the clerk of the circuit court in accordance with § 6718. In such case the court is not required by § 6725 to fix the terms for the stay of judgment in the circuit court, 49 O. S. 60.

3. Where the judgment is for the sale of mortgaged property, the undertaking should provide against waste, and for the value of the use and occupation as well as for payment of deficiency, 34 O. S. 671. Under this clause the common pleas or a judge thereof may fix the amount of the undertaking for stay in that court while the case is pending on error in the supreme court, 38 O. S. 658; A proceeding to reverse a judgment directing the sale of real property will not operate to stay the execution of

such judgment where the written undertaking is conditioned only as prescribed in the first subdivision of this section. In such case the undertaking must conform to the third subdivision, 3 C. C. 484; but where the proceedings are otherwise regular, and no reason exists for setting aside the sale except the pendency of such proceedings in error, and the filing of such insufficient undertaking, the sale should be confirmed. *Id.*

§ 6719. Undertaking must be approved. Before the written undertaking mentioned in § 6718 shall operate to stay execution of the judgment or order, the execution of the undertaking and the sufficiency of the sureties must be approved by the court in which the judgment was rendered or order made, or by the clerk thereof; and the clerk shall indorse such approval, signed by himself, upon the undertaking, and file the same in his office for the defendant in error. [51 v. 57, § 521.]

See 3 N. P. 61.

§ 6720. Substitute for undertaking. Instead of the undertaking prescribed in the second subdivision of § 6718, the conveyance or other instrument may be executed, and deposited with the clerk of the court in which the judgment was rendered, or order made, to abide the judgment of the reviewing court. [51 v. 57, § 520; S. & C. 1105.]

§ 6721. When executors, guardians, etc., need not give undertaking. Executors, administrators, and guardians, who have given bond in this state, with surety, according to law, shall not be required to give the undertaking mentioned in § 6718. [51 v. 57, § 607; S. & C. 1135.]

§ 6722. When execution may issue after undertaking given. In an action on a contract for the payment of money only, or in action for injuries to the person, if the defendant in error give adequate security to make restitution in case the judgment be reversed or modified, he may, on leave obtained from the court below, or a judge thereof in vacation, proceed to enforce the judgment, notwithstanding the execution of the undertaking to stay proceedings; such security must be an undertaking executed to the plaintiff in error, by at least two sufficient sureties, to the effect that if the judgment be reversed or modified he will make full restitution to the plaintiff in error of the money by him received under the judgment; but the provisions of this section shall not apply to judgments recovered in actions for libel, slander, malicious prosecution, false imprisonment, or assault and battery. [71 v. 106, § 522; S. & C. 1105.]

The claim on which the original action was brought can not be made an available set-off in an action on a restitution bond, by dismissing the original action or otherwise, 31 O. S. 28. When a petition in error is pending in the supreme court, plaintiff in error having given the supersedeas bond required by § 6718, the party in whose favor judgment was rendered in the lower court can not by giving a restitution bond recover upon the supersedeas bond until his judgment has been affirmed by the supreme court. He can only proceed against the judgment debtor and not against the sureties, 2 C. C. 459. The tribunal that decided the controversy in the first instance and rendered the judgment is to grant or refuse the leave to enforce the judgment, 2 H. 61; see 2 W. L. M. 329. But where judgment of the district court, to which a petition in error is being prosecuted in the supreme court is to be superseded by a bond, then the district court is the "court below," which can grant the leave, 5 Bull 423. A motion for leave to issue execution, notwithstanding a petition in error and supersedeas is addressed to the judicial discretion of the court or judge, 2 H. 61; 2 W. L. M. 329. The motion must be in writing, accompanied with a copy of the record, the undertaking proposed to be given, and proof that a written notice of the motion and of the time and place of its hearing has been served upon the plaintiff in error, 2 W. L. M. 329; see generally 3 N. P. 61.

§ 6723. Limitation. No proceeding to reverse, vacate or modify a judgment or final order shall be commenced, unless within six months after the rendition of the judgment or the making of the final order complained of; or in case the person entitled to such proceeding is an infant, a person of unsound mind or imprisoned, within six months as aforesaid, exclusive of the time of such disability.¹ [89 v. 45; 51 v. 57, § 523; S. & C. 1106.]

Appearance in supreme court estops to deny appearance in district court, 26 O. S. 185; or jurisdiction on the ground that no summons in error was issued or served, 43 O. S. 57.

Disability of one inures to all, 3 O. 49; 12 O. 351; 21 O. S. 131. To bring a party within the saving clause of this section it must appear that he was under disability at the time the judgment sought to be reversed is rendered, 31 O. S. 53, 57.

Consent can not confer jurisdiction after expiration of limitation, 43 O. S. 57.

Joint judgment. Proceedings in error to reverse a judgment for or against two or more parties should be commenced against all within the limitation prescribed by statute in order to confer on the reviewing court jurisdiction to reverse or modify such judgment or any part of it as to either of such parties, 14 O. S. 287; 10 O. C. 316; 30 O. S. 20; 45 O. S. 444; see cases *pro* and *con*, reviewed in 3 C. C. 290. Where the name of one of several partners who are plaintiffs in error, is omitted by mistake, the reviewing court in which the petition is filed may allow the omitted partner to become a co-plaintiff in error, though the time has elapsed for filing a petition in error, 39 O. S. 213; see 40 O. S. 431. Promissory note, 9 C. C. 439.

¹48 O. S. 542; 32 Bull 393; 34 Id. 166.

Limitation of act of 1878 (two years) not retroactive, 38 O. S. 46; 32 Bull 393.

Finding of facts. Neither motion for *new trial*, 34 O. S. 1, nor exception, necessary where there is a *finding of facts*, 35 O. S. 113.

Pleading of limitation not necessary, 35 O. S. 247, but facts bringing party within saving clause must be pleaded, 35 O. S. 282. Petition may be amended so as to bring party within saving clause, 36 O. S. 312. Petition pleading facts must be verified, 35 O. S. 244. Proceedings to modify judgment under § 5357, limitation three years, 34 O. S. 204; § 4991 has no application to proceedings in error, 34 O. S. 537.

Summons must issue before proceeding deemed commenced, though petition is filed in time, 16 O. S. 284; 36 O. S. 312.

Time begins to run from day judgment is actually rendered, not from first day of term, 16 O. S. 417; 17 O. 170. When by the judgment the whole merits of the case are disposed of, time begins to run, 31 O. S. 53; if it begins to run during life of ancestor, it does not stop at his death, 38 O. S. 373. When an appeal is dismissed and a motion to reinstate is continued to the next term and then overruled, time begins to run only from the overruling of such motion, 12 O. S. 333. Where a demurrer to an answer is sustained, but no judgment or definite order is made until next term, time is computed from the date of final judgment or order, 38 O. S. 46. When a petition in error is in good faith delivered to the proper officer to be filed and by him received to be kept in its proper place in his office, it is filed. The indorsement upon it by such officer of the facts and date of filing is but evidence of such filing, 43 O. S. 57. Defendant in error against whom as cross-petitioner in the trial court a judgment has been rendered, in favor of all the other parties to the suit and to which no error is assigned by another party is required to file his petition in error within the statutory period after the rendition of such judgment in order to obtain a reversal, 46 O. S. 102. Act changing time for filing from three to two years applies to all judgments before as well as thereafter rendered, 6 Bull 339. In all proceedings and suits of guardians and other trustees of minors no proceeding in the minor's own name will lie after he becomes of age, unless brought within time limited for other proceedings in error, 1 C. C. 345. Section does not apply to criminal cases, 6 C. C. 601. Pending proceedings not affected by amendment, 46 O. S. 694. Applies to cross petition, 5 C. C. 33. Service relates back to date of writ, 34 Bull 308. Must be commenced within six months, 33 Bull 350.

§ 6724. Stay of execution of judgment of justice. No proceeding to reverse, vacate, or modify a judgment rendered, or final order made, by a justice of the peace, shall operate as a stay of execution, unless the clerk of the court of common pleas take a written undertaking to the defendant, executed on the part of the plaintiff in error by sufficient surety, to the effect that the plaintiff will pay all the costs which have accrued or may accrue on such proceedings in error, together with the amount of any judgment that may be rendered against such plaintiff in error, either on the further trial of the cause, after the judgment of the court below is set aside or re-

versed, or upon and after the affirmance thereof in the court of common pleas; when the judgment or final order of a justice, sought to be reversed, directs the delivery of possession of real property, the undertaking shall be in such sum as may be prescribed by the court of common pleas, or a judge thereof, or, in the absence of such judge, by the probate judge of the county, to the effect that, during the possession of such property by the plaintiff in error, he will not commit, nor suffer to be committed, any waste thereon, and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the date of the undertaking until the delivery of the property, pursuant to the judgment, and costs; and the person entitled to such proceedings shall have the same time for prosecuting the same, before he is barred, as is provided in the last section, unless the judgment be paid off or satisfied prior to the commencement of such proceedings. [51 v. 57, § 524; 59 v. 43, § 524; S. & C. 1106; S. & S. 568.] See 10 O. S. 318.

§ 6725. **Terms of stay of execution in other cases.** Execution of a judgment or final order, other than those enumerated in this chapter, of any judicial tribunal, or the levy or collection of any tax or assessment therein litigated, may be stayed, on such terms as may be prescribed by the court in which the petition in error is filed, or by a judge thereof. [75 v. 808, § 22; 51 v. 57, § 525; S. & C. 1106.]

This section "merely provides for the suspension for the 'staying' of the execution of the judgment or final order. It does not, either in terms or in spirit, vacate the judgment. That is left to stand until reversed or set aside, and though not in the meantime to be executed." But in cases of contested elections, the order of the common pleas is not suspended by the allowance of a supersedeas under this section, 14 O. S. 515; 31 O. S. 451. An order staying the execution of a judgment or final order, as provided in this section, will only be granted on good cause shown, and the mere pendency of a petition of error to reverse the judgment of reversal is not a sufficient ground for an order granting such stay, 34 O. S. 291. Execution of a final order appointing a receiver of a railroad company and enjoining the company from certain acts may be stayed, pending the hearing of the petition in error, 2 C. C. 518. Such stay will not be granted as matter of course upon the mere filing of a petition in error, but should ordinarily be granted if difficult and important questions of law are raised, which if decided in favor of the plaintiff in error would require a reversal of the order, *Id.*; see 3 C. C. 392. An authenticated mandate from the district court, of the judgment remanding the cause to the court

of common pleas for further proceedings, can not be impeached in the latter court by showing that the clause remanding the case was not part of the order of the district court, but was added to the judgment without authority. The proper remedy is to apply to the district court to correct its records, 37 O. S. 11. Where judgment is rendered in the common pleas for money only and it is affirmed by the circuit court, defendant on filing his petition in this court to reverse the judgment below is entitled to a stay of execution upon giving an undertaking in double the amount of the judgment to the acceptance of the clerk of the circuit court in accordance with ‡ 6718. In such case the court is not required nor authorized by the provisions of ‡ 6725 to fix the term for a stay of the judgment in the circuit court, 49 O. S. 60. Section applicable to stay in habeas corpus proceedings, 52 O. S. 242.

‡ 6726. Proceedings after reversal. When a judgment or final order is reversed, either in whole or in part, in the common pleas court, the circuit court, or the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment; the circuit court or the common pleas court so reversing a judgment shall, upon the request of either party, specify in writing the ground or grounds of such reversal, which shall be filed and kept with the papers in the case; the court reversing or affirming such judgment or final order, shall not issue execution in causes that are so brought before it on error, on which it pronounces judgment, as aforesaid, but shall send a special mandate to the court below, as the case may require, for execution thereon, and the court to which such special mandate is sent shall proceed in the same manner as if such judgment or final order had been rendered therein; and on motion, and good cause shown, it may suspend any execution made returnable before it by order of the common pleas court, the circuit court, or the supreme court, in the same manner as if the execution had been issued from its own court; but such suspension shall not extend further than to stay proceedings until the matter can be further heard by the common pleas court, the circuit court, or the supreme court, as the case may be; but this section shall not apply to judgments of justices of the peace. [82 v. 38; 67 v. 115, ‡ 526.]

The judgment must be such as the court below should have rendered, 5 O. S. 251; 15 O. S. 40; 20 O. S. 232; 21 O. S. 492, 499, 1 C. C. R. 108; and may be reversed in part, 11 O. S. 72; 7 O. S. 107, 31 O. S. 433; and as to part of defendants, 32 O. S. 399; but where they are united in interest the judgment is a unit and

can not be reversed as to some and affirmed as to others, 21 O. S. 131. Final judgment may be rendered on reversal, 15 O. S. 559, but not for error in refusing a new trial, 25 O. S. 360; 26 O. S. 639, 47 O. S. 396; unless the facts are undisputed, 40 O. S. 339; 45 O. S. 333; see *Final Judgment*, § 6707nn. The reviewing court may, on reversal, grant an injunction, 38 O. S. 32; and may make an order of restitution, which will be final and conclusive between the parties, 31 O. S. 23; 35 O. S. 645. The judgment of reversal is effective notwithstanding the death of plaintiff in error, and it is competent for the court to which the cause is remanded for a new trial to order a revivor of the action in the name of the proper representative of the deceased party, 38 O. S. 96. Where the district court dismisses a proceeding in error on the erroneous ground that the judgment complained of is not reviewable, the supreme court is vested with discretion, on reversal of such erroneous order, to remand the cause to the district court for further proceedings, or render such judgment as that court should have rendered, 38 O. S. 558. When remanded, the case is taken up where the first error occurred, 1 O. S. 463. The duty of enforcing the judgment is imposed on the court to which the mandate is sent, and its disobedience punishable by contempt by that court, 41 O. S. 401. Court may, on remittitur, affirm judgment as modified, 37 O. S. 434. Party making remittitur and accepting judgment for reduced amount can not prosecute error, though reduction was erroneous, 36 O. S. 418; see 2 O. S. 98; 15 Id. 464. Final judgment dates from date of judgment reviewed and does not operate to divert right acquired by the parties subsequent to that date, 1 C. C. 108. Upon the reversal of judgment below in absence of anything to show what the evidence was, the reviewing court will not render judgment that should have been rendered below, but will remand for new trial, 12 Bull 100. Reversal of judgment of reversal estops party obtaining it from impeaching the original judgment, 15 O. S. 478.

§ 6727. *Costs on error.* When a judgment or final order is reversed, the plaintiff in error shall recover his costs, and when reversed in part, and affirmed in part, the court may apportion the costs between the parties in such manner as it deems equitable. [51 v. 57, § 527; S. & C. 1107.]

This only includes the costs on error, and not the costs in the court below, 16 O. 316. Where the court has no jurisdiction, it can render no judgment for costs, but costs of proceedings in error to reverse a judgment rendered without jurisdiction must be adjudged to plaintiff in error, 22 O. S. 268. Where the case is dismissed for want of jurisdiction of the subject matter, but the court erroneously proceeds to render judgment against each party for his costs, the judgments and proceedings to reverse the same are *ex parte*, and the provisions of this section which have application to proceedings of an adversary character do not apply; hence such judgments will only be reversed at the costs of plaintiff in error, 8 O. S. 205. Mistake as to costs may be corrected by reviewing court; case not within this section, 18 O. S. 184. Where several damages are assessed on several causes of action, a judgment for the aggregate amount of damages may be reversed as to part of the causes of action and affirmed as to the rest. In such case, where error was assigned

to all the causes of action, and the judgment reversed as to part and affirmed as to the residue, the costs on error were, under this section in its original form, equally divided between the parties, 31 O. S. 433. Under former statutes the rule was where a final order was reversed in part and affirmed in part that the costs in error were equally divided between plaintiff and defendant, 10 O. S. 453; but where a judgment is modified so as to diminish the rate of interest, this was done at the costs of the defendant in error, 21 O. S. 281.

§ 6728. **Mistake of clerk not ground of error, etc.** A mistake, neglect, or omission of the clerk shall not be a ground of error, until the same has been presented and acted upon in the court in which the mistake, neglect, or omission occurred. [51 v. 57, § 528; S. & C. 1108.]

§ 6729. **Rendering judgment prematurely not ground of error.** The rendering of judgment before the action stood for trial according to the provisions of title one, part third, shall be deemed a clerical error. [51 v. 57, § 529; S. & C. 1108.]

Entering judgment against a garnishee before judgment against the defendant is to be regarded, after judgment against the latter, as only a clerical error, 13 O. S. 219. But a judgment rendered by default before the day named in the summons for answer may be reversed, 34 O. S. 123.

§ 6730. **Penalty on affirmance by circuit court.** If the circuit court affirm a judgment on petition in error, it shall also render judgment against plaintiff in error for five per centum upon the amount due from him to the defendant in error, unless the court enter upon its minutes that there was reasonable ground for the proceedings in error. [82 v. 38; 51 v. 57, § 608; S. & C. 1135.]

See § 6712, note.

§ 6731. **Writs of error and certiorari abolished.** Writs of error and *certiorari* to reverse, vacate, or modify judgments or final orders in civil cases are abolished (1); but courts shall have the same power to compel transcripts of the proceedings, containing the judgment or final order sought to be reversed, to be furnished, completed, or perfected, as they heretofore had under writs of error and *certiorari* (2). [51 v. 57, § 530; S. & C. 1108.]

1. Except as to matters of a criminal nature, *certiorari* was abolished by the code, 2 O. S. 326; 4 Id. 500; 6 Id. 55, 262; 19 Id. 348. 2. 15 O. S. 296; but a reviewing court can make no alteration in the record of the court below, 27 O. S. 44. The party desiring such perfect record in the reviewing court suggests in writing filed in the cause that the record before the court is not a full or complete record, called "suggestion of diminution of

record;" whereupon the court will issue an order to the lower court to certify up a transcript of the complete record, which must be all of such record in the lower court, which court can not make new parts of such record not before existing. *Yaple's Pr.*, etc., 656. Proceedings subsequent to the reversal form no part of the record of the final judgment of reversal, and can not be brought into the court of last resort upon suggestion of diminution of record. The remedy is by answer, 32 O. S. 76. Where defendant in error, by way of answer to the petition, avers that the transcript upon which plaintiff has assigned error is imperfect and defective, such averment may be regarded as a suggestion of diminution of record and would authorize the court to order the justice to furnish a complete and perfect transcript, 80 O. S. 58.

§ 6732. Proceedings when judgment of justice affirmed.

If the judgment of a justice of the peace, taken on error as herein provided to the court of common pleas, be affirmed, such court shall render judgment against the plaintiff in error for the costs of suit, and award execution therefor; and the court shall thereupon order its clerk to certify its decision to the justice, so that the judgment affirmed may be enforced as if such proceedings in error had not been taken; or, such court may award execution to carry into effect the judgment of the justice, in the same manner as if the judgment had been rendered in the court of common pleas. [51 v. 57, § 531; S. & C. 1108.]

§ 6732a. Attorney's fee when judgment for wages affirmed. When a judgment for wages rendered by a justice of the peace, is, by the defendant, taken on error, as herein provided, to the court of common pleas and affirmed, the costs of suit shall include a fee of fifteen dollars for the attorney of the defendant in error. But no such attorney fee shall be taxed in the costs, unless said wages have been demanded in writing, and not paid within three days after such demand. [89 v. 43.]

§ 6733. Proceedings when judgment of justice reversed.

When the proceedings of a justice of the peace are taken on error to the court of common pleas, in manner aforesaid, and the judgment of such justice is reversed or set aside, the court shall render judgment of reversal, and for the costs that have accrued up to that time, in favor of the plaintiff in error, and award execution therefor; and the cause, except when the reversal is because the justice had no jurisdiction of the plaintiff in error, or of

the subject of the action, shall be retained by the court for trial and final judgment, as in cases of appeal. [67 v. 115, § 532; S. & C. 1108.]

Common pleas, on reversal, retains cause for trial, 4 O. S. 593, except when reversal is because justice had no jurisdiction; contra, 17 O. S. 641 (before amendment). When the judgment of a justice is reversed on error, it is the duty of the court to render judgment for the costs of the plaintiff in error up to that time, including the costs in the justice's court, 22 O. S. 371. Void judgment of justice reversed and set down for hearing, 31 O. S. 634. § 6565 provides for taking bills of exceptions on trials before justices; § 6610 for exceptions in forcible entry and detainer cases. In proceedings to reverse, etc., judgments of the justice in such cases, leave must be obtained of the common pleas to file the petition in error in that court, Id.

§ 6734. **Decrees in chancery, how reviewed.** The final orders or decrees of courts of chancery heretofore rendered, or which may hereafter be rendered, in any chancery proceeding pending on July 1, 1853, may be reviewed in the manner provided in the five succeeding sections, and within the time prescribed in § 6723; and all suits in chancery pending at that time may be prosecuted to final decree in like manner as if this title had not taken effect. [51 v. 57, § 533; S. & C. 1109.]

Remedy by bill of review does not exist in respect to an action commenced and prosecuted under the code, 34 O. S. 204.

§ 6735. **Bill of review.** When a party, complainant or defendant, seeks a review of a final decree or order in chancery, he may file in the clerk's office of the court in which the decree was rendered a short petition, setting forth the names of the parties to such suit, the substance of the decree or order sought to be reviewed, and an assignment of the errors relied upon to reverse or set aside such decree or order, and a prayer for such reversal; and errors in law and in fact may be assigned at the same time. [46 v. 90, § 1; S. & C. 1110.]

§ 6736. **Process thereon.** On the filing of such petition, the clerk shall issue a summons against all the parties to the original suit, except such as are petitioners in the suit of review, as in other cases. [46 v. 90, § 2; S. & C. 1112.]

§ 6737. **Original papers to be used.** All the original papers and evidence in the original cause, and the entries made, shall be used on the hearing of the bill of review; and it shall not be necessary for the party to procure a

copy of the record of proceedings in the original cause, nor shall it be necessary to recite, in the bill of review, any of the facts set forth in the pleadings in the original cause. [46 v. 90, § 3; S. & C. 1112.]

§ 6738. *How decree in circuit court may be stayed.* When a petition for review is filed in the circuit court, a judge of the court may, in vacation, upon good cause shown, stay proceedings on the former decree until the next term of the court in which such proceedings are pending; and the judge shall direct the nature and the amount of security to be given by the party applying for such stay. [82 v. 38; 49 v. 26, § 1; S. & C. 1112.]

§ 6739. *How stayed in common pleas.* When such petition is filed in the common pleas, the judge of such court may exercise the same power, on the same terms. [49 v. 26, § 2; S. & C. 1112.]

§ 6740. *Petition in error in the nature of a bill of review.* A petition in error, in the nature of a bill of review, may, on leave of the supreme court, or a judge thereof, be filed in the supreme court, to reverse or modify any decree in chancery, that heretofore has been or that hereafter may be rendered in any circuit court in this state, in which the title to real estate is in controversy, or the amount in controversy is not less than five hundred dollars; and the proceedings upon such petition in error shall, in all respects, be governed by the provisions of the six preceding sections of this chapter; but this section shall not extend to suits that have been commenced since the first day of July, 1853, and the petition in error must be filed within three years after the rendition of the decree so sought to be reversed or modified. [82 v. 38; 53 v. 178, § 4; S. & C. 1152.]

CHAPTER II.

MANDAMUS.

§ 6741. **What is mandamus.** Mandamus is a writ issued in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. [51 v. 57, § 569; S. & C. 1124.]

Attorney general. Mandamus does not lie to compel him to bring an action in *quo warranto* to test the constitutionality of a statute, 48 O. S. 552.

Attorney's fees. Mandamus to compel payment of attorney's fees, see *Commissioners of County, infra*.

Auditor of city. Mandamus lies to compel auditor to draw warrant for monthly salary, 22 Bull 113.

Auditor of county. Mandamus lies against the auditor of the county to compel him to enter tax upon duplicate, 5 O. S. 444, but not until the time arrives for making it up, 5 O. S. 590; to compel transfer of real estate on duplicate, 30 O. S. 276, but not until evidence of title is presented, 22 O. S. 469; to compel allowance of constable's fees, 9 O. S. 25, and fees for sustenance of jury, 19 O. S. 116; to compel refunder of taxes paid by auditor's mistake, 24 O. S. 330; to compel payment for children's home, 43 O. S. 311, of interest on township bonds, 7 O. S. 327; payment of court-house janitors' salary, 11 Bull 234. It does not lie to compel payment of claim before allowance by commissioners, 12 O. S. 54; 28 O. S. 589; nor to pay costs in prosecution for breach of peace when defendant proves insolvent, 12 O. S. 429; nor to compel payment of amount allowed by commissioners on contract for work not let to lowest bidder as required, 22 O. S. 546; nor payment of jury fees in excess of number of days jurors served, 34 O. S. 137; nor to compel payment of claim when he has no right to fix amount to be drawn, and it is not ascertained, 1 O. S. 323. When it does not lie against auditor, under § 1038, to compel him to call the attention of the county commissioners to erroneous taxes charged and collected in previous years, 11 Bull 39.

Auditor of state. Mandamus lies against auditor of state to compel payment of appropriation, 36 O. S. 211; 37 O. S. 1; but not unless allowed by the requisite number of votes, 20 O. S. 1; to compel issue of bank notes under state law, 6 O. S. 318; to compel performance of an act which the law requires, where the only cause of refusal shown is that he has doubts of the constitutionality of the act requiring it, 6 O. S. 318; to accept return of bank for taxation, 6 O. S. 45; to apportion taxes, 15 O. S. 482. It does not lie to compel auditor to pay for articles not within specific appropriation, 5 O. S. 583; nor to allow payment of extra compensation of sergeant-at-arms of legislature not provided for by law nor properly ratified, 34 O. S. 218.

Board of education. Mandamus lies against board of education to compel it to furnish text-books to schools, 35 O. S. 368; to appropriate money for payment of bonds for school purposes, 27 O. S. 96; to release sureties of county treasurer from liability

for school funds by special act, 38 O. S. 3; to compel board to fix teacher's salary, 4 C. C. 93; to compel school board to perform its legal duty toward resident taxpayer and his child, 35 O. S. 383, 384; refused to compel directors of school district to admit colored children to schools for white children, 21 O. S. 198; refused to compel board to award contract for construction of school buildings to one not the lowest bidder, 42 O. S. 374; to compel county auditor to put levy of board on tax duplicate when, 12 Bull 223; refused to compel board to fix compensation of school examiner, 4 C. C. 97; see 2 C. C. R. 510; 45 O. S. 555; 19 Bull 173.

Board of public works. It lies against the board of public works to compel approval of "plan," 39 O. S. 628; to compel issuance of permit to tap sewer on payment of usual fee, 1 C. C. R. 501; to compel approval of bond of city contractor, 43 O. S. 46; but not to award contract to lowest bidder whose bid stipulates that the board can reject any bid, 3 C. C. 542.

City clerk. Mandamus refused to compel city clerk to issue certificates of election, 7 O. S. 355; refused to compel him to advertise ordinance for street railroad, 38 O. S. 644.

City council. Allowed to compel city council to accept bond, 11 O. S. 544; levy taxes, 14 O. 252; to issue orders for transfer of funds to proper officers, 19 O. 178.

Clerk of court. Mandamus is the appropriate remedy to compel clerks of court to perform their official duties, 43 O. S. 331. Refused to compel clerk of court to recanvass returns, 26 O. S. 216, and count returns excluded by him, 14 O. S. 315; refused to compel him to issue certificate of election when election was not held at time fixed by law, 20 O. S. 167; refused to compel him to abstract votes for person for office not required to be filled at election, 44 O. S. 628. It lies to compel clerk, in case of change of venue, to make the certificate required under § 560; 43 O. S. 324; to issue writ of execution, 3 C. C. R. 581; to enter upon journal fact that court has fixed amount of appeal bond, though the fixing of such amount has not been journalized and amount has been subsequently increased, 6 C. C. 31.

Commissioners of county. The writ was granted to compel commissioners of county to issue county bonds, 1 O. S. 77; 33 O. S. 169; to assess taxes to pay interest on county bonds, 6 O. S. 280; to award contract, 21 O. S. 311; to compel approval of sheriff's bond, 10 O. S. 129; approval or disapproval of sufficiency of sureties of recorder's bond, 31 O. S. 451; to finish improvement under alleged unconstitutional act, 17 O. S. 558; to pay assistant prosecuting attorney, 40 O. S. 331, 332; 20 O. S. 421; refused to pay assistant prosecuting attorney under act 1865, 24 O. S. 597, and act 1872, 25 O. S. 13, 14; refused to pay prosecuting attorney to prosecute criminal complaints before magistrates, 21 O. S. 648; refused to pay attorney assigned to defend prisoner under act 1875, 26 O. S. 599; refused to levy tax for satisfaction of judgment where there was no unreasonable delay, 19 O. 415; and refused in the following cases: To compel commissioners to accept official bond of treasurer when election was not authorized, 7 O. S. 126, or sheriff's bond adjudged not entitled to office, 14 O. S. 515; to refund taxes on property alleged to be exempt, 31 O. S. 271; to compel payment of claim on which it was their duty to act, and against the validity of which they had decided, 26 O. S. 364; 9 Bull 322 (the remedy is by appeal to common pleas, Id.); to compel subscription to railroad when enjoined therefrom, 7 O. S. 278;

to erect public building, 1 O. S. 80, or build bridge, 31 O. S. 211, for this would be controlling their discretion, *Id.*

Commissioners of city. Compelled by mandamus to assess tax for street improvement, 31 O. S. 592, but not compelled to ascertain floating debt, 24 O. S. 536, nor reinstate chief of fire department removed by them for incompetency, 26 O. S. 24.

Condemnation proceedings. Mandamus lies to compel city solicitor to furnish vouchers to pay compensation in condemnation proceedings, 26 O. S. 109, but does not lie to enforce the verdict in such proceedings, 17 O. S. 103; 22 O. S. 534.

Contempt. Judges sitting at chambers can not punish as for contempt for disobedience of peremptory writ, 29 Bull 263.

Contract. Mandamus does not lie to enforce the performance of a contract involving no trust, 16 O. S. 308; see 22 O. S. 546. It lies to compel the letting of a contract for public work to the lowest bidder, 19 O. S. 97; 20 O. S. 425; 4 C. C. 86; but not when the lowest bidder refuses to give the bond required, 21 O. S. 311; or when no notice is given or the notice is insufficient, 31 O. S. 415, or the bid is not in conformity with the notice, *Id.*; 35 O. S. 136; or where the difference between the accepted and lowest bids is not shown, the application unreasonably delayed, and no good reason appears why a remedy was not sought by injunction, 18 O. S. 386; or where all the bids have been rejected in good faith, 1 C. C. R. 194; 3 C. C. R. 542.

Corporation. Mandamus will not lie to compel a corporation to issue bonds, 29 O. S. 174, or certificate of stock, 51 O. S. 83, or transfer stock, 42 O. S. 30; 11 Bull 103.

Court. It will lie to compel trial of case by a court, 5 O. 542, and compel correction of records, 8 O. S. 201, and compel issuance of warrant for removal of patient from asylum by probate judge of county from which patient was sent, 7 O. S. 154, but not by a probate judge of a county from which the patient was not sent, 17 O. S. 149. See Judge, *infra*.

Discretion. The remedy by mandamus, while appropriate to compel an officer to proceed in a judicial or quasi judicial matter confided by law to his jurisdiction, can not be invoked to correct his errors, or control his discretion, 48 O. S. 460.

Elections. It will lie to compel sheriff to issue election proclamation, 38 O. S. 344. Will not lie to compel election canvassers to exclude returns, 43 O. S. 652; lies to compel admission of candidate to witness opening of returns and abstract of votes, 8 Bull 191; refused to compel county auditor to count unsealed returns, 5 O. S. 64; lies to compel board of elections to certify to proper officers abstract of votes shown by tally sheet, 49 O. S. 656, 662; refused to compel court clerk and justices to abstract votes for persons for office not required to be filed by electors, 44 O. S. 623.

Governor. It lies to compel governor to issue proclamation, 5 O. S. 528, but not to compel him to count H. L. M. and Henry L. M. as different names, 38 O. S. 599.

Injunction. It does not lie to compel a party to do what, by injunction, he is prohibited from doing, 7 O. S. 278.

Insane asylum. It does not lie to compel superintendent of insane asylum to take back patient, 38 O. S. 496.

Insurance commissioner. It does not lie to compel insurance commissioner to issue certificate to corporations of foreign state to do business here, the laws of which do not entitle Ohio corporations to do business there, 39 O. S. 486; nor to compel super-

intendant of insurance to admit foreign company to transact business in this state when on inquiry he is not satisfied with its financial soundness, 42 O. S. 103.

Jailer. It lies to compel jailer to take prisoner before commissioner of insolvents, 19 O. S. 581.

Judge. It lies to compel a judge to sign a bill of exceptions, 22 O. S. 207; 43 O. S. 16; but not when the bill is untrue, and the power of determining whether it is true or not is vested with the judge, 4 O. S. 351; 22 O. S. 207. The application in such case should be accompanied by the bill, 22 O. S. 207; but where the alternative writ commands a judge of an inferior court to allow and sign a certain bill of exceptions, filed with the petition in the case and averred to be true, and which was tendered to him in due time, or to show cause why he does not sign the same, and he fails to answer, or answers and fails to show a sufficient cause, the peremptory writ should command him to sign the particular bill named, 43 O. S. 16. Okey and McIlvaine, JJ., dissented. It lies to compel judge to accept surety and suspend jurisdiction by state court, 15 O. S. 377, but not after judgment, 7 O. S. 451. It does not lie to compel court to hear testimony on application to admit accused to bail, 24 O. S. 196, nor to compel court to accept attorney as bail bond, 11 Bull 154. See Court, *supra*.

Justice of the peace. It does not lie to compel justice to take appeal bond after ten days, 3 Bull 792, nor to sign bill of exceptions he claims to be untrue, 3 Bull 428, nor one presenting no question of law or of the competency or tendency of the evidence, 22 O. S. 537. Refused to compel signing bill of exceptions in forcible entry and detainer, 11 Bull 234.

Legal duty. The right to a writ of mandamus to enforce the performance of an official act by a public officer depends upon his legal duty and not upon his doubts, 43 O. S. 312.

Limitation. There is no statutory limitation as to the time within which a writ of mandamus may be obtained, 32 O. S. 236; but where the delay has been unreasonable or prejudicial to defendant, the court in the exercise of a sound judgment may well refuse the writ, 4 C. C. 97, 100. Writ refused to fix compensation of relator as school examiner for any period prior to six years before the commencement of the proceeding, *Id*.

Liquidation of claim necessary before payment enforceable by mandamus, 26 O. S. 365.

Militia. The writ lies to compel city to furnish armory to militia, 1 Clev. R. 31.

Ohio State Reports. It lies to compel state reporter to furnish assignee of contractor for publication of Ohio State Reports, manuscript opinions to complete volume, 42 O. S. 264.

Police officer. It lies to compel reinstatement of, 29 Bull 281.

Prosecuting attorney. To compel prosecuting attorney to indorse certificate authorizing county commissioners to purchase land for public purposes under 66 v. 54 when the contract complies with the statute, 23 O. S. 335, otherwise not, *Id*. 568.

Receiver. It does not lie against a railroad corporation and its receiver directing their conduct in operating the road, 35 O. S. 154.

Recorder. It lies to compel recorder to surrender records after term of office, 7 O. 1, to record mortgage, 16 Bull 356.

Salary. It lies to compel auditor to draw warrant for, 22 Bull 113.

School. See Board of Education.

Second Mandamus not allowed after refusal, 43 O. S. 457.

Sheriff. See *Commissioners of County Election.*

Solicitor of city. See *Condemnation.* The writ lies to compel city solicitor to approve of bond of contractor, 43 O. S. 46.

Stock. See *Corporation.* It lies to compel inspection of books by stockholders, 7 C. C. 429.

Sunday law. Mandamus refused to compel superintendent of police to enforce, 3 C. C. 332; granted to compel police board to enforce, 19 Bull 347.

Tax. It lies to compel levy of tax, 17 O. S. 608, after the time has expired, 35 O. S. 458 (see Auditor of County, Commissioners of County, supra); to compel township clerk to draw warrant, 11 O. S. 326; 29 O. S. 161; to compel township trustees to levy tax, 20 O. S. 288, to pay interest on township bonds, 14 O. S. 569, refused, 13 O. S. 311. Generally 50 O. S. 714.

Treasurer. Against township treasurer, to compel payment of school teachers' wages, 4 O. S. 561; see 17 O. S. 32; 8 O. S. 347; by treasurer of state to compel county treasurer to transfer to the state treasury the state's proportion of the taxes collected by such county treasurer, 38 O. S. 259. Funds exhausted, 2 C. C. R. 475.

Turnpike. It does not lie to compel repair of turnpike, 16 O. S. 308.

United States Courts. Original mandamus proceeding in state court not removable to, 27 Bull 41.

§ 6742. By what courts it may issue. The writ of mandamus may be issued by the supreme court (1), the circuit court, or the common pleas court; and although it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it can not control judicial discretion (2). [82 v. 38; 77 v. 265; 51 v. 57, § 569; S. & C. 1124.]

1. Application should be made to the circuit court unless there are special reasons for making it in the first instance to the supreme court. Such cases in the latter court are not entitled as of right to be heard out of their regular order on the general docket, 26 O. S. 170; but see now § 440. 2. 1 O. S. 30, 149; 17 O. S. 608, 616; 24 O. S. 393, 401; 26 O. S. 364; 43 O. S. 652. When upon an application in the circuit court for a peremptory writ, after a hearing upon issue joined, the petition is dismissed, the supreme court will not, in the exercise of its original jurisdiction, hear the case upon its merits. The proper remedy is by proceedings in error, 43 O. S. 458.

§ 6743. Application for the writ. The application for the writ must be by petition, in the name of the state, on the relation of the person applying (1), and verified by affidavit; and the court may require a notice of the application to be given to the defendant, or may grant an order to show cause why it should not be allowed, or may allow the writ without notice. [51 v. 57, § 573; S. & C. 1127.]

1. 5 O. S. 497. Before the revision of 1880, the writ and answer contained the whole pleadings, 1 C. C. R. 119. Form, 19 O.

178. The petition may on motion be required to be made more definite and certain, 1 C. C. 119.

§ 6744. **When writ may not issue.** The writ must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law; and it may issue on the information of the party beneficially interested. [51 v. 57, § 570; S. & C. 1126.]

See § 6741n; 1 O. S. 77; 22 O. S. 534; 42 O. S. 30; 3 C. C. R. 332; mandamus to compel board of elections to certify to proper officers abstract of votes shown by tally sheets may be instituted on the relation of any elector of the county, 49 O. S. 656, 662; to issue stock certificate, 51 O. S. 87.

§ 6745. **When peremptory writ may issue in the first instance.** When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a court may, in the first instance, allow a peremptory mandamus; and in all other cases an alternative writ must first be issued, on the allowance of the court, or a judge thereof. [51 v. 57, § 572; S. & C. 1127.]

When the material facts upon an application for mandamus are admitted, and the plaintiff is entitled to relief, this court should award not an alternative, but a peremptory writ of mandamus, 42 O. S. 263, 275. The refusal to allow an alternative writ is not reviewable on error; the remedy is by application to a higher court, 37 O. S. 121. Where an alternative writ is issued commanding a number of acts, either separate or connected, to be done by the defendant, the relator is entitled to a peremptory writ for such distinct acts or parts of acts as he may show a right to have performed, where there is not such mutual dependence between the several acts, or parts of acts, that they can not be separated, 48 O. S. 142. Peremptory writ must conform to alternative, 4 C. C. 487.

§ 6746. **The allowance of the writ.** The allowance of the writ, and an order that the defendant, immediately upon service, do the act required to be performed, or, when an alternative writ is allowed, that he do the act, or show cause before the court, at a specified time and place, why he does not do the act, shall be entered on the journal. [51 v. 57, § 574; S. & C. 1127.]

§ 6747. **By whom writ to issue. What to contain.** **Service.** The writ shall be issued by the clerk of the court in which the application is made, and shall contain a copy of the petition, verification, and order of allowance, and shall be served upon the defendant, personally, by copy, by the sheriff of the proper county, or by a person specially authorized by the court or judge;

such officer or person shall report his proceedings therewith to the court; and if the service be made by a person not an officer, the return must be verified by his affidavit. [51 v. 57, § 571; S. & C. 1126.]

Counsel must prepare the writ and submit it to the court. It is not the duty of the clerk to prepare it, 4 O. S. 493. The alternative writ must contain a statement of all the facts necessary to justify the order sought for by the proceedings, 22 O. S. 371. It may be amended, 4 O. S. 493; 23 O. S. 335; may, on motion, be required to be made more definite and certain, Id.; see 1 C. C. R. 119; but omissions can not be supplied by affidavits, 22 O. S. 371. The office of a return to a peremptory writ of mandamus, is to show a compliance by him with the order of the court, 48 O. S. 460. The return, however, is not conclusive, and the relator may controvert its truthfulness by a motion to require the respondent to show cause why he should not be attached for contempt for disobeying the order of the court in the particulars set forth in the motion, Id.

§ 6748. When defendant may demur or answer. On the return day of an alternative writ, or such further day as the court may allow, the defendant may answer as in a civil action; or, if the writ be allowed by a single judge, he may demur. [51 v. 57, § 575; S. & C. 1127.]

The answer must respond to all the allegations in the writ, or it will be held bad on demurrer, 14 O. S. 252. An answer in mandamus to compel a judge to sign a bill of exceptions, that defendant is willing to sign a true bill, and that the bill presented is not true, is sufficient, 22 O. S. 207; see Form, 43 O. S. 16; 19 O. 183

§ 6749. Reply and demurrer. The plaintiff may demur to the answer, or reply to any new matter therein; and the defendant may demur to the reply as in a civil action. [51 v. 57, § 576; S. & C. 1127.]

Formerly no reply was allowed, 9 O. S. 599. Demurrer to reply, 4 C. C. 485. A general demurrer will search the record and put in issue the sufficiency of the petition, 48 O. S. 142.

§ 6750. Judgment on default. If no answer be made, a peremptory mandamus must be allowed against the defendant. [51 v. 57, § 576; S. & C. 1127.]

§ 6751. Pleadings construed as in civil action. The pleadings shall have the same effect, and must be construed, and may be amended, as in civil actions. [51 v. 57, § 577; S. & C. 1127.]

43 O. S. 16: 459,

§ 6752. Issues of fact; how tried. Issues of fact made by the pleadings must be tried, and the further proceedings thereon had, in the same manner as in civil actions. [51 v. 57, § 577; S. & C. 1127.]

§ 6753. What damages may be recovered. If judgment be given for the plaintiff, the relator may recover the damages which he has sustained, to be ascertained by the court, or a jury, or by a referee or master, as in a civil action, and costs; and a peremptory mandamus shall also be granted to him without delay. [51 v. 57, § 578; S. & C. 1128.]

Where judgment is given for plaintiff, this section does not authorize the assessment of damages against the state in favor of the relator, 36 O. S. 409. Cited in 10 C. C. 410.

§ 6754. Such recovery shall be a bar. Such recovery of damages against a defendant shall be a bar to any other action upon such cause of action. [51 v. 57, § 579; S. & C. 1128.]

§ 6755. Costs against relator. If judgment be given for the defendant, all costs shall be adjudged against the relator. [75 v. 813, § 15.]

See 4 Bull 608, 614.

§ 6756. Penalties. When a peremptory mandamus has been directed to a public officer, body, or board, commanding the performance of a public duty specially enjoined by law, and the court finds that such officer, or any member of such body or board, has, without just excuse, refused or neglected to perform the duty so enjoined, the court may impose a fine, not exceeding five hundred dollars, upon such officer or member; and such fine, when collected, shall be paid into the treasury of the county wherein the duty ought to have been performed, and the payment thereof shall be a bar to an action for any penalty incurred by such officer or member by reason of such refusal or neglect. [51 v. 57, § 580; S. & C. 1128.]

§ 6757. When county auditor to levy and assess tax. When a peremptory mandamus has been awarded against the commissioners of a county, or the trustees or board of education of a township, or the council, trustees, or board of education of a municipal corporation, to levy and assess a tax to pay interest upon a debt, or to create a sinking fund for the payment of a funded debt, and such officers have resigned, or refuse or neglect to levy and assess such tax, or their offices are vacant, the court, upon the motion of an interested person, and upon being satisfied of the fact of such resignation, va-

cancy, or refusal or neglect to levy such tax, and of the right of such person to have the same levied and assessed, may cause a special order to be issued to the auditor of the proper county, commanding him to levy and assess upon the taxable property of the county, township, or municipal corporation the taxes required by law, or the judgment or order of said court, to be levied and assessed for the purposes aforesaid, and to place the same upon the duplicate for collection by the county treasurer. [63 v. 15, § 1; S. & S. 604.]

§ 6758. Auditor responsible as an officer of court. His fees. When such special order is issued to the auditor he shall be responsible for the execution thereof in the same manner as if he were an officer of the court; and he shall receive such fees for his services in executing the order, if not otherwise fixed by the court, as he is allowed by law for making tax duplicates; which fees, and all other costs of the proceeding, he shall add to the taxes levied in executing such order, and place the same upon the duplicate for collection with such taxes. [63 v. 15, § 2; S. & S. 606.]

§ 6759. The last two sections not to limit power of court. The provisions of the last two sections shall not be construed to limit the power of the court to carry its order and judgment into execution, or to punish any officer named therein for contempt or disobedience of its orders or writs. [63 v. 15, § 3; S. & S. 607.]

CHAPTER III.

QUO WARRANTO.

§ 6760. When quo warranto may be brought. A civil action may be brought in the name of the state:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this state, or an office in a corporation created by the authority of this state.

2. Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, works a forfeiture of his office.

3. Against an association of persons who act as a corporation within this state without being legally incorporated. [75 v. 814, 815; 36 v. 68, § 1; S. & C. 1264.]

Quo warranto is now a civil action, and proceeds by petition and not by information, 8 Rec. 422; 34 O. S. 365. The presidency of a city council is a public office, within the meaning of this section, 45 O. S. 196. The action lay to oust police commissioners appointed by the governor under 82 v. 101, and removed by him for misconduct, 44 O. S. 98; but not to oust the superintendent of police appointed under that act and suspended by the mayor for insubordination, Id. 137. It was held the proper remedy to test the legality of the election of trustees of a cemetery association, 5 O. S. 238. It was brought to test the constitutionality of the act, 82 v. 236, relating to parol of prisoners, 43 O. S. 629. It does not lie to try title to an office the term of which has expired, 17 O. 143, or nearly expired, 17 O. S. 543, or where the statute has provided a mode of contest, 15 O. S. 114. *Quo warranto* for usurpation must be against the individuals, not against the corporation, 18 O. S. 263; 8 Rec. 422. For forms of pleading see 18 O. S. 263. Acknowledgment of certificate of incorporation before notary, instead of justice of peace, under S. & C. 272, held bad on *quo warranto*, 21 O. S. 662. Title as corporators of trustees of an incorporated religious society, can not be impeached in a collateral proceeding by showing that they are not trustees *de jure*. This can only be done in a direct proceeding by information in the nature of *quo warranto*, 12 O. S. 248. On a judgment of ouster against an incumbent in office this court will not proceed to adjudge in favor of another claimant whose election is then in process of regular contest, 15 O. S. 137. Inquiry on *quo warranto* into grounds of rejection of votes at corporate election, 22 O. S. 354. The remedy by *quo warranto* is only employed to test the actual right to an office or franchise, and it can not afford relief for official misconduct and can not be employed to test the legality of the official action of public or corporate officers, 7 C. C. 152. When individuals act as corporation, remedy against, 51 O. S. 163. Action in *quo warranto*, to test right to hold position of director of agricultural society, can not be brought by persons claiming places on their own relation, 52 O. S. 82.

§ 6761. When against a corporation. A like action may be brought against a corporation:

1. When it has offended against a provision of an act for its creation or renewal, or any act altering or amending such acts.

2. When it has forfeited its privileges and franchises by non-user.

3. When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges, and franchises.

4. When it has misused a franchise, or privilege, or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege, or right in contravention of law. [78 v. 43.]

Action against R. R. corporation to contest right to state canal lands, 34 Bull 15.

The object of a proceeding in *quo warranto* against a corporation is to determine its right to the exercise of any or all the

franchises it may claim the right to use and possess not to divest it of the ownership of property unless acquired by a usurpation of the proprietary rights of the state, 29 Bull 290. A prayer that the defendant, a corporation, be ousted from the right to use the lands of the relator for a private purpose is in effect a prayer that the company be ousted from the possession of the lands and not within the purpose of a proceeding in *quo warranto*, Id. Railroad company for five years failing to construct line, but constructs line for benefit only of coal mines of company guilty of misuse of franchise, 40 O. S. 504. Discrimination in freight rates an exercise of a franchise in contravention of law, 47 O. S. 130. Statute applies to foreign insurance company carrying on business in this state, 47 O. S. 167, 180; 27 Bull 407; 49 O. S. 440. Existence of corporation dates from filing its articles with Secretary of State, 12 Bull 269. Board of Education not such a corporation as is contemplated in this section, 7 C. C. 152. The action must be against the corporation itself, 25 O. S. 280. A clear case must be made to authorize a forfeiture, 32 O. S. 487. A corporation is entitled to the benefit of the amendment of a statute pending suit, 26 O. S. 19. The evidence is limited to the charges made in the petition, 23 O. S. 445. The rights and liabilities of third persons can not be determined, 43 O. S. 482. Judgment of probate court in proceeding by corporation to appropriate land for public use that corporation has the legal right to make the appropriation is not a bar to *quo warranto* proceeding to determine right of corporation to the exercise of the power of eminent domain, 5 C. C. 58.

‡ 6762. Who may commence action. The attorney general, or a prosecuting attorney, when directed by the governor, supreme court, or general assembly, shall commence any such action; and when, upon complaint, or otherwise, he has good reason to believe that any case specified in the preceding section can be established by proof, he shall commence an action. [75 v. 815; 36 v. 68, §§ 1, 8; 50 v. 267, §§ 9, 10, 11, 12; S. & C. 89, 1264, 1266.]

The attorney general alone can commence the action in the supreme court. The authority of the prosecuting attorney is confined to the county, 34 O. S. 365. Judgment in favor of defendant in *quo warranto* by prosecuting attorney on individual relation is no bar to an action on the relation of the attorney general, 18 O. S. 262. Attorney general can not be compelled by mandamus to bring action in *quo warranto* to test constitutionality of statute. It was not designed that the court should be called upon to exercise its authority to direct an action to be brought by the attorney general to test the constitutionality of legislation whenever a citizen who feels aggrieved should request it, 48 O. S. 552. Judges of supreme court in their private capacity have no power to direct proceedings in the nature of a *quo warranto*, 10 O. 360. Proceeding to oust persons claiming to be directors of railroad company should be brought by prosecuting attorney on his own relation or by leave of court, etc., 6 C. C. 410. The court will exercise its power only "when something relating to the court or its business renders it necessary or advisable," 48 O. S. 552; 50 O. S. 120.

§ 6763. **Upon whose relation.** Such officer may, upon his own relation, bring any such action, or he may, on leave of the court, or a judge thereof in vacation, bring the action upon the relation of another person; and if the action be brought under the first subdivision of § 6760, he may require security for costs, to be given as in other cases. [75 v. 815; 36 v. 68, § 1; S. & C. 1264.]

The attorney general may, on his own relation, without being directed by the governor, supreme court, or general assembly, bring a civil action in *quo warranto* against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, 45 O. S. 196. He may in such case require security for costs, but need not do so, *Id.*

§ 6764. **Id. In case of usurpation of office.** A person claiming to be entitled to a public office unlawfully held and exercised by another may, by himself or an attorney at law, upon giving security for costs, bring an action therefor. [75 v. 815; 37 v. 70, § 1; S. & C. 1270.]

The relator, under this section, is not required to obtain leave to file the petition, but the action must be brought in the county in which the defendant resides or may be summoned, 34 O. S. 365. See 50 O. S. 120.

§ 6765. **Who to prosecute in absence, etc., of prosecuting attorney.** When the office of prosecuting attorney is vacant, or when the prosecuting attorney is absent, interested in the action, or disabled from any cause, the court, or a judge thereof in vacation, may direct or permit any member of the bar to act in his place to bring and prosecute the action. [36 v. 68, § 23; S. & C. 1269.]

§ 6766. **Petition in action for usurpation of office.** When the action is against a person for usurping an office, the petition shall set forth the name of the person who claims to be entitled thereto, with an averment of his right thereto; and judgment may be rendered upon the right of the defendant, and also upon the right of the person so averred to be entitled, or only upon the right of the defendant, as justice requires. [75 v. 815; 36 v. 68, § 3; S. & C. 1265.]

But a petition prosecuted on behalf of the state by the attorney general to oust an incumbent of an office need not set forth the name of the person claiming to be entitled thereto, 33 O. S. 101.

§ 6767. **Parties defendant.** All persons who claim to be entitled to the same office or franchise may be made

defendants in the same action, to try their respective rights to such office or franchise. [75 v. 815; 36 v. 68, § 7; S. & C. 1266.]

§ 6768. **Where action to be brought.** An action under this chapter can be brought only in the supreme court, or in the circuit court of the county in which the defendant, or one of the defendants, resides or is found, or, when the defendant is a corporation, in the county in which it is situated, or has a place of business; but when the attorney general files the petition, the action may be brought in the circuit court of Franklin county. [82 v. 39; 75 v. 816; 36 v. 68, § 1; 50 v. 267, § 13; S. & C. 89, 1264.]

See § 204 (82 v. 18). Formerly the action could be brought in the common pleas, S. & C. 89, and a judge of the common pleas had authority as a member of the district court to grant leave to file the information in the district court, 5 O. S. 216. § 204 (S. & C. 89) did not repeal or supersede the authority of the prosecuting attorney to file the information, 5 O. S. 216; and it was held that the district court had jurisdiction in *quo warranto* against an association of individuals for usurping a corporate franchise when either the office of the association or the office of its president was within the county. Id. § 204 provides that the attorney general may prosecute any proceeding in *quo warranto* in the supreme court of the state, the circuit court of Franklin county, or the circuit court of any county wherein the company proceeded against has a place of business, or the officer or officers, person or persons, made defendants reside or may be found, 82 v. 18.

§ 6769. **Application for leave to file petition, and notice to defendant.** Upon application for leave to file a petition, the court or judge may direct notice thereof to be given to the defendant previous to granting such leave, and may hear the defendant in opposition thereto; and if leave be granted, an entry thereof shall be made on the journal, or the fact shall be indorsed by the judge on the petition, which shall then be filed. [75 v. 816; 36 v. 68, § 9; S. & C. 1267.]

§ 6770. **Issue of summons, and service.** When the petition is filed without leave and notice, a summons shall issue, and be served as in other cases; and such summons may be sent to and returned by the sheriff of any county by mail, who shall be entitled to the same fees thereon as if it had been issued and returned in his own county. [75 v. 816; 36 v. 68, § 2; S. & C. 1265.]

Return day of summons, 11 Bull 294.

§ 6771. Service by publication. When a summons is returned not served because the defendant, or its officers or office, can not be found within the county, the clerk shall publish, for four consecutive weeks, in a newspaper published and of general circulation in the county, and if there is no such newspaper, then in a newspaper printed in this state, and of general circulation in such county, a notice, setting forth the filing and substance of the petition; and, upon proof of such publication, the default of the defendant may be entered, and judgment entered thereon, as if the defendant had been served with summons. [75 v. 816; 36 v. 68, § 13; S. & C. 1268.]

In *quo warranto* in circuit court against three persons neither of whom resides in or is found in the county and no appearance is entered, they can legally be constructively served by publication of notice under this section, 6 C. C. 410.

§ 6772. Pleadings after petition. The defendant may answer, or file an answer, which may contain as many several defenses as he has, within thirty days after the filing of the petition, if it was filed on leave and notice, or after the return day of the summons; and the plaintiff may file a demurrer or a reply to such answer within thirty days thereafter. [75 v. 816; 36 v. 68, § 12; S. & C. 1268.]

Defendant may set up several defenses, 22 O. S. 354, 361. An answer that defendants have for twenty years exercised the franchise which they are accused of usurping is sufficient, 11 O. 126; *id.*, whether it applies when attorney general prosecutes, 18 O. S. 262. In *quo warranto* for usurpation of office, the answer must allege continuance of qualification for office, 15 O. 723. Designation after defendants have been served with process is no answer, 22 O. S. 354, nor injunction in United States courts before action, 18 O. S. 263. Where, in *quo warranto* for usurping the franchise of being a corporation, the defendants named plead that they were the directors of the corporation without denying that they were corporators, and averred the legal existence of the corporation, it was held they were regarded as claiming to be members of the corporation, 22 O. S. 411. Where the time for answer stated in the summons was the third Saturday after the return day, it was held the summons should be quashed, Bull 294. Cause of forfeiture of franchise may be set up by repudiation, 10 O. 535, 542; 23 O. S. 121-126. Reply demurrable for departure, 18 O. S. 263, 284. Formerly, new matter in the replication must be denied, 25 O. S. 279. Defendants entitled to open and close in proceeding to oust them from franchise of being a corporation, 37 O. S. 590, 631. *Forms of pleading*, 18 O. S. 262, 267.

§ 6773. Court may extend time for pleading. An order may be made by the court, or a judge thereof, extending the time within which any pleading may be filed; but

such order shall not work a continuance of the case. [75 v. 816; 36 v. 68, § 14; S. & C. 1268.]

§ 6774. Judgment in case of usurpation of office, etc. When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising, an office, franchise, or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom, and that the relator recover his costs. [75 v. 816; 36 v. 68, § 15; S. & C. 1268.]

Court may render judgment of ouster against defendant without passing on claimant's rights, 10 O. S. 238; see 15 O. S. 137.

§ 6775. Judgment where director of corporation found to have been illegally elected. When the action is against a director of a corporation, and the court finds that, at his election, either illegal votes were received, or legal votes were rejected, or both, sufficient to change the result, judgment may be rendered that the defendant be ousted, and of induction in favor of the person who was entitled to be declared elected at such election. [75 v. 817; 70 v. 176, § 1.]

§ 6776. When court may order new election in such case. In a case named in the last section the court may order a new election to be held, at a time and place, and by judges, appointed by the court, notice of which election, and naming the judges, shall be given for the time and in the manner provided by law for notice of elections of directors of such corporation; the order of the court shall become obligatory upon the corporation and its officers when a duly certified copy thereof is served upon its secretary personally, or left at its principal office; and the court may enforce its order by attachment, or in any other manner it deems necessary. [75 v. 817; 70 v. 176, § 2.]

§ 6777. Rights of person adjudged to be entitled to office. If judgment be rendered in favor of the person averred to be entitled to an office, he may, after taking the oath of office, and executing any official bond required by law, take upon him the execution of the office; and he shall immediately thereafter demand of the defendant all the books and papers in his custody or within his power appertaining to the office from which he has been ousted. [75 v. 817; 36 v. 68, § 4; S. & C. 1265.]

§ 6778. Action for damages against person ousted. Such person may, at any time within one year after the date of such judgment, bring an action against the party ousted, and recover the damages he sustained by reason of such usurpation.¹ [75 v. 817; 36 v. 68, § 6; S. & C. 1266.]

§ 6779. How judgment of court enforced. If such defendant refuse or neglect to deliver over any such book or paper pursuant to such demand, he shall be deemed guilty of a contempt of court, and shall be fined in any sum not exceeding ten thousand dollars, and imprisoned in the jail of the county until he complies with the order of the court, or is otherwise discharged by due course of law. [75 v. 817; 36 v. 68, § 5; S. & C. 1266.]

§ 6780. Judgment when corporation has forfeited its rights. When, in any such action, it is found and adjudged that a corporation has, by an act done or omitted, surrendered or forfeited its corporate rights, privileges, and franchises, or has not used the same during a term of five years, judgment shall be entered that it be ousted and excluded therefrom, and that it be dissolved; and when it is found and adjudged that a corporation has offended in any matter or manner which does not work such surrender or forfeiture, or has misused a franchise, or exercised a power not conferred by law, judgment shall be entered that it be ousted from the continuance of such offense, or the exercise of such power. [75 v. 817; 43 v. 94, § 1; S. & C. 1271.]

Where a statute authorizes a corporation to be formed with certain powers, and the corporation is formed under it, with other powers, the ouster will be only from the exercise of such excessive powers, 23 O. S. 166. Where a corporation has abused or misused its corporate powers, but not in any particular form as to which it is declared by statute, the act shall operate as a forfeiture of its charter, the court is vested with a discretion to determine whether the corporation shall be ousted of its franchise to be a corporation or from the exercise of the powers illegally assumed, 35 O. S. 258. And where a corporation has assumed franchises not granted, and it appears that the certificate of incorporation does not comply with the requirements of the statute under which it is organized, the court, in the exercise of its discretion, will oust it of the franchise to be a corporation, 29 O. S. 399; but where a corporation has been guilty of such negligence as is made, by the terms of its charter, a cause for the forfeiture of its franchise, and the state on the relation of the attorney general demands a judgment of dissolution on account thereof, the court has no discretion to refuse such judgment on the ground that public or private interest would be better subserved by preserving the existence of the corporation, 23 O. S.

¹2 N. P. 401.

121. Judgment can not be taken by default, unless the petition sets out the fact of forfeiture, 8 Rec. 422. Judgment of ouster is not retroactive in its effect upon prior rights or liabilities, 43 O. S. 481; 33 O. S. 107, 115 s. c. 453; is no defense to suit by creditor against stockholders to enforce payment of subscriptions, 38 O. S. 269. On ouster of corporation easements revert, 44 O. S. 406. When a court has excluded a corporation from its franchise to be a corporation, it has exhausted its jurisdiction over the subject matter, 43 O. S. 490. When a corporation has been guilty of acts which by statute are made a cause of forfeiture of its franchise, the court has no discretion to refuse such judgment, 23 O. S. 121; 35 O. S. 264. Whether a corporation which is shown to have misused or abused its franchises should be ousted of its corporate franchises, is a question not capable of determination by any fixed rule or test, but rests in the sound discretion of the court, in the light of all the circumstances of the case before it, 42 O. S. 579.

§ 6781. Appointment of trustees when corporation dissolved. The court rendering a judgment dissolving a corporation shall appoint trustees of the creditors and stockholders of the corporation, who, after giving an undertaking, payable to the state of Ohio, in such sum and with such sureties as the court may designate and approve, conditioned that they will faithfully discharge their trust, and properly pay and apply all money that may come into their hands, shall have power to settle the affairs of the corporation, collect and pay outstanding debts, and divide among the stockholders the money and other property which remain after the payment of debts and necessary expenses. [75 v. 817; 43 v. 94, § 2; S. & C. 1271.]

35 O. S. 264.

§ 6782. Powers and duties of trustees. The trustees shall forthwith demand all money, property, books, deeds, notes, bills, obligations, and papers, of every description, within the custody, power, or control of the officers of the corporation, or either of them, belonging to the corporation, or in any wise necessary for the settlement of its affairs, or for the discharge of its debts and liabilities; and they may sue for and recover the demands and property of the corporation, and shall be jointly and severally liable to the creditors and stockholders to the extent of its property and effects which come into their hands. [75 v. 818; 36 v. 68, § 19; S. & C. 1268.]

§ 6783. How trustees placed in possession. An officer of such corporation who refuses or neglects to deliver over any such money, or other things, pursuant to such

demand, shall be deemed guilty of a contempt of court, and shall be fined not exceeding ten thousand dollars, and imprisoned in the jail of the proper county until he complies with the order of the court, or is otherwise discharged by due course of law; and he shall be liable to the trustees for the value of all money, or other things, so refused or neglected to be surrendered, together with all damages that have been sustained by the stockholders and creditors of the corporation, or any of them, in consequence of such neglect or refusal. [75 v. 818; 36 v. 18, § 20; S. & C. 1269.]

§ 6784. **Judgment for costs.** If judgment be rendered against a corporation, or against a person claiming to be a corporation, the court may render judgment for costs against the directors or other officers of the corporation, or against the person claiming to be a corporation. [75 v. 818; 36 v. 68, § 17; S. & C. 1268.]

§ 6785. **Proceedings to enforce judgment ordering delivery of property.** In all actions under this chapter, when the judgment is against the defendant, the court may make an order directing the defendant forthwith to deliver over the books, papers, property, money, deeds, notes, bills, and obligations, to the persons entitled hereto, or the trustees appointed to receive the same, and may send a transcript of the proceedings, including a copy of such order, to the court of common pleas of the proper county, with a special mandate directing such court to carry the same into effect; and upon complaint being made, upon affidavit, to such court of common pleas, of a neglect or refusal to comply with such order, that court shall direct an attachment, returnable forthwith, to issue for the defendant, who may be required to answer under oath touching the premises; and if it appears that the defendant so neglects or refuses, such court shall render judgment of fine or imprisonment, or both, as the court making the order might have rendered. [75 v. 818; 36 v. 68, § 21; S. & C. 1269.]

§ 6786. **Injunction ancillary to proceeding against banking associations.** Any stockholder, or stockholders, owning not less than one-fourth of the capital stock of any banking association actually paid in, or entitled to the beneficial interest therein, may have, pending proceedings in *quo warranto* against such corporation, an in-

junction restraining the directors thereof from making any disposition of the assets of such corporation prejudicial to the interests of such stockholder or stockholders, or inconsistent with their duties as directors. [75 v. 819; 57 v. 50, § 2; S. & C. 1272.]

§ 6787. Court may require bank directors to give security. The court, or a judge thereof in vacation, may, upon satisfactory proof that the directors of such corporation have violated, or are about to violate, any of the franchises thereof, require them to give security to the stockholders thereof, to the satisfaction of the court or judge, for the proper discharge of their duties, and for the proper management and security of the assets; and such court or judge may enjoin such directors from paying out or issuing the notes of circulation of such bank, and from incurring any additional liabilities except for the payment of the necessary services of the officers and employes of such banking association, the amount of which, while such proceedings are pending, shall be under the control of the court. [75 v. 819; 57 v. 50, § 2; S. & C. 1272.]

§ 6788. Directors may be enjoined from borrowing or issuing money, etc. Such court or judge may, on petition, enjoin such directors from borrowing or issuing, either directly or indirectly, any of the money or assets of such bank, for their individual benefit, while such proceedings are pending. [57 v. 50, § 3; S. & C. 1272.]

§ 6789. Limitations. Nothing in this chapter contained shall authorize an action against a corporation for forfeiture of charter, unless the same be commenced within five years after the act complained of was done or committed; nor shall an action be brought against a corporation for the exercise of a power or franchise under its charter which it has used and exercised for a term of twenty years (1); nor shall an action be brought against an officer to oust him from his office, unless within three years (2) after the cause of such ouster, or the right to hold the office, arose. [75 v. 819; 36 v. 68, § 26; S. & C. 1270.]

1. 11 O. 126 (1841). 2. 16 O. 358 (1847). A proceeding under this section must be commenced within five years after the act complained of was done, whether commenced by the state on the relation of the attorney general or otherwise; but a corporation may be ousted by such proceedings from the exercise of a

power or franchise not conferred by law where the same has not been exercised for the term of twenty years, 49 O. S. 187, 187; see 50 O. S. 239. Does not apply to corporation's claim to state land, 34 Bull 15.

§ 6790. **Action for damages against officers, etc., of dissolved corporation.** When judgment of forfeiture and ouster is rendered against a corporation because of any misconduct of the officers or directors thereof, a person injured thereby may, at any time within one year thereafter, in an action against such officers or directors, recover the damages he has sustained by reason of such misconduct. [75 v. 819; 36 v. 68, § 22; S. & C. 1269.]

§ 6791. **Provisions of this chapter cumulative to other remedies.** Nothing in this chapter contained is intended to restrain any court from enforcing the performance of trusts for charitable purposes, at the relation of the prosecuting attorney of the proper county, or from enforcing trusts, or restraining abuses, in other corporations, at the suit of a person injured. [75 v. 819; 36 v. 38, § 24; S. & C. 1270.]

§ 6792. **Disposition of fines.** All fines collected under the provisions of this chapter shall be paid into the treasury of the proper county, for the use of the common schools within the county. [75 v. 820; 36 v. 68, § 25; S. & C. 1270.]

§ 6793. **Actions under this chapter to have precedence, etc.** Actions under this chapter in any court shall have precedence of any civil business pending therein; and the court, if the matter is of public concern, shall, on the motion of the attorney general or prosecuting attorney, require as speedy a trial of the merits of the case as may be consistent with the rights of the parties. [75 v. 320; 57 v. 50, § 1; S. & C. 1272.]

MISCELLANEOUS PROVISIONS.

When laws take effect. Every law passed which contains no provision as to the time when it shall take effect, shall take effect on the first day of May next after its passage. [77 R. S. 53 v. 153, § 1.]

An act may be shown by the journals of the general assembly to have been passed before the date it bears, and when so shown it will speak from the day of its actual passage, 14 O. S. 72; and the repealing clause takes effect at the same time as the rest of the act, 16 O. S. 193. Although an act may be expressly repealed, yet if it appear that it was intended that it should have temporary effect, the language of the repealing

clause will be retained accordingly, 1 O. S. 563. When a statute which repeals a prior statute on the same subject is to take effect and be in force *from* and *after* a day named, it does not take effect until the expiration of the day named, 36 O. S. 584; but where a statute is to take effect "*from* and *after* its passage," and not *from* and *after* a *day named* in the act, the day it was to be enacted is to be included; but in the latter case it does not take effect until the expiration of the day named, 39 O. S. 578; 36 O. S. 584. A statute declaratory of a former one has the same effect upon such former act in the absence of intervening rights, as if the declaratory act had been embodied in the original act at the time of its passage, 37 O. S. 275.

Repeal of a repealing act does not revive former act.

Whenever a law is repealed which repealed a former law, the former law shall not thereby be revived. [§ 78 R. S.; 29 v. 513, § 1.]

Where a section of the Revised Statutes is repealed and re-enacted in a changed form, a subsequent statute, which in terms again repeals and re-enacts the original section in still another form, is, as a general rule, to be regarded as a repeal of the section in its amended form, and the section in its last form will take its place in the revision as part of the Revised Statutes, 39 O. S. 653. A right of action given by an act of 1816 against stockholders of unauthorized banks was, by an act of 1824, suspended, and this latter act was, in 1840, repealed; it was held that the right of action under the act of 1816 was thereupon in full force, notwithstanding the provision of the act of 1809, which was the same as § 78, 1 O. S. 362. Repeals by implication not favored, 2 N. P. 225.

Amendment or repeal of statutes not to affect pending suits. Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed; nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act. [§ 79 R. S. 63 v. 22, § 2.]

Under this provision, before the clause was inserted that "when the repeal or amendment relates to the remedy it shall not affect pending actions," etc., a change in the statute relating to the competency of witnesses applied to pending cases, 25 O. S. 500; 27 O. S. 22. And where a statute giving a right of action for causing death contained a limitation as to the time within which suit might be brought, a repeal of the clause containing such limitation did not affect pending suits, 25 O. S. 620; 24 O. S. 603, and see 31 O. S. 111. "Pending action," 1 N. P. 195.

Appeals. Where a statute provided for an appeal, if the same

should be perfected in ten days, and after the rendition of a judgment and before the expiration of ten days this provision was repealed, the repeal did not affect the right of appeal, 29 O. S. 19. An act passed in 1871 provided for an appeal "from any order, decision, or decree made under an act regulating the mode of administering assignments in trust for the benefit of creditors," passed in 1859. In 1874, the act of 1859 was so amended as to include power to make other orders in the insolvency proceeding. It was held that the act of 1871 gave the right of appeal from orders provided for in the act of 1859 as amended in 1874, 34 O. S. 280. Under a statute regulating appeals passed during the term at which a judgment was rendered a party was not prevented from appealing, although the judgment was rendered before the passage of the act, 26 O. S. 306; see 7 O. (1 pt.) 247, 266.

Miscellaneous. Vested rights not affected, 31 O. S. 358. Repeal of statute relating to appointment of guardian, 35 O. S. 593. Proceeding in error, limitation, 38 O. S. 46. Repeal or amendment of existing statute as to remedy not to affect pending action unless expressly so provided in repealing statute, 39 O. S. 576. Under two mile assessment pike act, 40 O. S. 318. Legislation in council with respect to street improvements, a "proceeding" under § 1539, 42 O. S. 522. No generality of language used in an amendment relating to the remedy will make it applicable to a pending action, prosecution, or proceeding; to effect that end the intention must be expressed, 46 O. S. 178.

Time within which cause to be decided. Any cause now pending, or that may hereafter be begun, in any court of record in this state, when submitted on motion or demurrer, shall be determined and adjudicated thereon by such court within thirty days after such submission. Any such cause when submitted to the court on proceedings in error, or on final trial on the issues joined, shall be determined and adjudicated within ninety days after such submission. This act shall apply to all causes sent to a referee or special master, and to all motions affecting the confirmation, modification, or vacation of any report of such reference or master. This act shall in no way affect, alter or change the rules of the supreme court, as the same may be now, or hereafter fixed by said court. [90 v. 192.]

This act took effect Aug. 1, 1893.



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